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THE LAW OF REAL PROPERTY,

BEING

A COMPLETE COMPENDIUM OF REAL ESTATE LAW, EMBRACING: ALL CURRENT CASE LAW, CAREFULLY SELECTED, THOROUGHLY ANNOTATED AND ACCURATELY EPITOMIZED; COMPARATIVE STATUTORY CONSTRUCTION OF THE LAWS OF THE SEVERAL STATES; AND EXHAUSTIVE TREATISES UPON THE MOST IMPORTANT BRANCHES OF THE LAW OF REAL PROPERTY.

EDITED BY

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PREFACE.

In presenting this, the fourth volume of our serial on the Law of Real Property, to the profession, we desire to reaffirm our original purpose to make this entire series, at every stage of its progress, an exceedingly useful help to every busy lawyer and over-worked judge who must daily, in some way, have occasion to examine some of the more than one thousand questions directly connected with the one hundred text book subjects completely covered by this work. Instead of attempting to rewrite the law, as laid down by the masters whose excellent works have so long been in the hands of the profession, we have contented ourselves with an honest effort to chronicle its growth as affected by our legislative and judicial forces, uncolored by any preconceived opinions of our own. We have not assumed to say that any case, however weak, is of no value; but, in epitomizing the cases upon any given point, while preserving them all, we have, in the arrangement and space occupied, to a large extent, indicated the character and relative importance of each case, frequently quoting the important language of the opinion and giving the cases cited by the court; and where there is a conflict of authority both sides are given. We have constantly borne in mind the thought that we could be most helpful to those whom we seek to serve by making the finding of the law as easy as possible. One index issued in a separate volume covers the entire series. In this index we have not attempted to repeat the contents of the four large volumes, but we have tried to make the finding of any portion or their contents the matter of but a moment's work. We realize the responsibility which accompanies the task upon which we are engaged, but our hands have been strengthened for better work and our hearts lightened and warmed by the generous reception given to our work, and the many kind words of commendation, for all of which we again desire to make grateful acknowledgment.

THE EDITORS.

CASES REPORTED IN FULL.

Alabama State Land Co. v. Thompson, 104 Ala. 570.	289
Blackbourn v. Tucker, 72 Miss. 735.....	69
Bullock v. Bullock, 52 N. J. Eq. 561.....	634
Carneal v. Lynch, 91 Va. 114	575
Cater v. Northwestern Tel. Exch. Co., 60 Minn. 539.....	222
Higgins v. Bordages, 88 Tex. 458.....	361
Hiles v. Fisher, 144 N. Y. 306.....	385
In Re Directors of Old Colony R. Co., 163 Mass. 356..	217
Johnson et al v. Schmidt, 90 Wis. 301.....	209
McCall's Adm'r v. Hampton, et al. Ky.	134
Menken Co. v. Brinkley, 94 Tenn. 721.....	799
Pennsylvania R. Co. v. Mont. County Pass. Ry. Co., 167 Pa. 62	19
President Etc. B. & F. T. R. v. Balt. C. & E. R. 81 Md. 257.....	212

SYNOPSIS OF CONTENTS.

ABSTRACTERS.

Right to use public records. Liability for mistakes. Abstracts as evidence.

ABUTTING OWNERS.

Rights of, as against a street railway in a country highway. Ownership of fee—Removal of earth. Change of grade—Liability of municipality; Measure of damages. Obstruction of way by municipality. Vacation of streets. Assessments against. Railroads in streets. Side track for storing cars. Elevated railroads.

ACKNOWLEDGMENTS.

Before whom taken. Certificate—Form and sufficiency; Conclusiveness of. Proof by subscribing witness. Married women. Curative statutes. Miscellaneous notes.

ADVERSE POSSESSION.

What constitutes. Proof of—Burden and presumptions. Extent of possession. Holding under the title of another. Color of title. Payment of taxes. Tacking. Rights of the public. Adverse possession as between Landlord and tenant. Trustee and cestui que trust; Cotenants; Remaindermen. Breaking the continuity of. Title by—Nature and assertion of. Sale of land adversely held. Construction of statutes.

ALIENS.

Heirs of aliens—Construction of statute.

ASSIGNMENTS FOR CREDITORS.

What constitutes—Execution. Assignments by partners—Individual property. Setting aside. Discontinuing assignment proceedings. Miscellaneous notes. Construction of statutes.

BONA FIDE PURCHASER.

What constitutes. Notice. Purging equities. Sufficient knowledge to put one on inquiry.

BOUNDARIES.

Agreements fixing. Evidence concerning—Estoppels and presumptions. Running courses—Reversal of calls in a deed. Streams as—High and low water mark; Title to submerged lands. Meander lines on non-navigable lakes and ponds. Highways and streets. Monuments, courses and distances. Monuments and streams—Central point intended.

CHARITABLE USES.

Provision of Mississippi constitution prohibiting devises for, construed and applied. Statutes of mortmain. What is a charitable use. Church controversies—Title to property. Legislative power over.

COMMUNITY PROPERTY.

Recent construction of, and amendments and changes made in, the statutes of the several states and territories since the compilation of this subject contained in Vol. III, §§ 70–87.

CONTRACTS.

Construction of. Contracts for benefit of third persons. Time and place of performance. Public policy—illegal contracts. Fraud in procuring—Actions for deceit; Representations in matters of opinion; Representations by agent; Representations by executor. Reliance upon fraud. Rescission—Inadequacy of price; Defects of title; When denied and other relief given; Improvements and rents; Particular cases; Practice.

CORPORATIONS.

What is an incorporated company. De facto corporations. Powers of—Owning land; Taking mortgages; Deeds and mortgages. Duties and liabilities of officers of private corporations. Changing name. Municipal corporations—Powers over parks, streets and public grounds; Construction and sale of waterworks; Purchase and sale of realty; Annexation of territory.

COVENANTS.

Personal. Running with the land. Covenants of warranty. Against incumbrances. Breach of—Eviction necessary; After-acquired title as a defense; Measure of damages. Miscellaneous notes.

CROPS AND EMBLEMENTS.

Title to crops raised by one in possession without right. Mortgages and liens upon crops.

CURTESY AND DOWER.

Retroactive effect of dower statutes. When the widow is entitled to dower. Loss of dower. Assignment of dower. Curtesy of husband. Miscellaneous notes.

DANGEROUS PREMISES.

Liability for injury by. Invitation—Distinction as to children. Injury to trespasser. Duty of owner in respect to buildings. Injury by fall of building. Municipalities and public officers.

DEDICATION.

What constitutes. Who may acquire by. Maps and plats. Acceptance by the public. Distinction between abutting owners and the public. Presumed, when. Use of dedicated property—Reservations.

DEEDS.

Conveyance of an expectancy by an heir—Equitable rights of the grantee. What constitutes a conveyance. Deeds and wills distinguished. Use of seal. Grantor and grantee. Delivery of deeds—General principles; By recording; To third persons; In escrow; Date of delivery. Acceptance. Surrender and cancellation. Construction. Recitals in.

Restrictions—Upon alienation; As to use of property. **Reservations and exceptions.** **Reservations**—Of right of way; Of right to possession. **Cancellation for duress, fraud and undue influence.** **Same**—Fiduciary relations. **Quitclaim deeds.** **Miscellaneous notes.** **Form of deeds**—Recent constructions of, and amendments made in, the statutes of the several states and territories since the compilations on this subject in Vol. I, §§ 57-105; Vol. II, §§ 133-147; Vol. III, §§ 181-197.

DEFINITIONS.

Definitions of the following terms: "Bridges;" "Buildings, improvements and other property;" "Easement;" "House;" "Improved land;" "Incumbrances;" "Interest;" "Owner of land;" "Relative;" "Rent;" "Rental value;" "Shore;" "Surface water;" "Timber;" "Title;" "Value of use."

DESCENT.

Children and grandchildren. Half bloods. Adopted children. Bastards. Husband and wife. Widow's quarantine. Advancements. Rights of creditors against heirs. Miscellaneous notes.

DESCRIPTION OF REAL ESTATE.

Sufficiency of. Reference to other instruments. Sufficient descriptions. Insufficient descriptions. Parol evidence to aid or supply. Construction. Supplying a missing side. Quantity and distance. Construction of particular descriptions.

EASEMENTS.

What is and creation of. License does not create. Creation by prescription. Permissive use by the public. Light and air. Way of necessity. Private ways. Public use of private way. Lateral support. Reservation of. Nonuser of. Use by servient owner. Extinguishment or loss.

EJECTMENT.

When the action will lie. Title necessary to maintain—Estoppel to deny title. Ejectment by one cotenant. Ejectment against railroads. Defenses. Parties, pleading and practice. Proof. Judgment and writ of execution.

EMINENT DOMAIN.

Public use defined and discussed—Statute held unconstitutional. **Condemnation of franchises.** Practice in condemnation proceedings under Mass. Stat.—Right of land owner to be heard. Additional servitude—What is; Telegraph and telephone lines; Gas mains; Electric street railway. What property is subject to eminent domain. Electric railways—Injury by conduction of electric current. Inconsistent uses—Exclusive possession. What is a taking. Mortgaged lands. Compensation before taking. Measure of damages—General principles; Improvements; Benefits considered; Lands affected but not embraced in the taking; Appropriation for sewer purposes; Non-contiguous lands. Practice in condemnation proceedings.

EQUITY.

Doctrine of equitable conversion. Subrogation. Miscellaneous notes.

ESTATES.

Fee simple estates. Estates tail. Shelley's case. Life estates. Sale of life estate—Forfeiture. Remainders. Vesting of estates. Estates in joint tenancy—Mortgage by joint tenant. Perpetuities. Condi-

tions subsequent—General principles; Conveyance of land for particular use; Conveyance in consideration of support. Merger—General principles; Conveyance taken by lien holder.

ESTOPPEL.

By deed or decree. By deed as against grantee. Estoppel in pais—General principles. Accepting benefits—Acquiescence in the wrong. Elements of equitable estoppel. Standing by—Holder of record title. Married women—Estoppels in favor of husband's creditors. Estoppel in pais as against the public. Title by estoppel—After-acquired title.

EVIDENCE.

Altered deeds—Validity and admissibility in evidence; Presumptions as to alterations. Judicial notice—Presumptions. Presumptions of death from absence. Parol evidence—Contradicting written; Explaining contracts; Collateral and subsequent agreements. Declarations and admissions. Opinions. Proof of execution of deeds. Deeds made pursuant to judicial sales. Records—Exemplification of within and without the state. Pleadings and decrees. Judgment as evidence against strangers. Mortuary tables. Miscellaneous notes.

EXECUTION SALES.

What interest may be sold. Issue, levy and return of execution. Appraisement and notice. Manner, time and place of sale. Sale in parcels or in solido. Sheriff's deed. Title, rights and liabilities of purchaser. Setting aside. Sale under a dormant judgment. Miscellaneous notes.

EXECUTORS AND ADMINISTRATORS.

Powers of. Rights as to possession and rents of decedent's realty. Sale to pay debts. Same—Practice. Sales by—Validity; Setting aside; Purchase by executor or administrator. Miscellaneous notes.

FENCES.

Fencing railroads—Statutes construed. Miscellaneous notes.

FIXTURES.

What are. Fixtures as between landlord and tenant; mortgagor and mortgagee; vendor and vendee. Removal of manure by tenant. Machinery.

FORCIBLE ENTRY AND DETAINER.

When the action may be maintained. Practice. Statutes construed.

FRAUDULENT CONVEYANCES.

What are. Devises in fraud of creditors of devisee. Conveyances to near relatives. Deeds between husband and wife. Innocent purchase by wife—Fraud of husband—Agent's knowledge imputed to principal. Husband obtaining credit on, or doing business with, his wife's capital. Conveyances in fraud of dower. Badges of fraud. Voluntary conveyances. Rights of subsequent creditors. Preference of creditors. When binding on the parties. Fraud of heirs against creditors of decedent. Effect on the parties—Validity of mortgage to secure fictitious consideration. Bona fide purchaser. Exempted property. Setting aside—Parties; Pleading; Proof; Burden of proof; Practice.

HOMESTEAD.

Liability for assessments for municipal improvements—Texas Constitution construed. Who may claim—Occupancy necessary. Declaration of homestead. In what lands claimed. Shifting of, from one tract to another. Exemption from debts. Debts for which a homestead is liable. Liability for money borrowed to pay purchase price. Exemption of homestead insurance money. Rights of surviving husband, wife and children. Abandonment, loss or waiver of. Power of husband alone to effect an abandonment. Conveyance and incumbrance of—Necessity of joint conveyance by husband and wife; Joinder by insane wife. Miscellaneous notes.

HUSBAND AND WIFE.

Estates by entirety—Effect of married women statutes; Control of estate; Liability for debts; Mortgage by husband. Antenuptial contracts and marriage settlements. Contracts and conveyances between. Conveyance to—Creation of joint tenancy. Inchoate interests. Same—Action by wife concerning. Effect of divorce on real property rights. Miscellaneous notes.

IMPROVEMENTS.

Rights of occupying claimants. Improvements by purchasers and mortgagees; By life tenants; By cotenants. Miscellaneous notes.

INFANTS AND INSANE PERSONS.

Contracts with and conveyance by. Ratification of voidable contracts. Disaffirmance—Return of consideration. Setting aside deed of insane person—Presumption and burden of proof. Judicial proceedings affecting interests of. Power of courts of equity over lands of infants. Trust property—Decree of sale against infant trustee. Running of statute of limitations against.

INSURANCE.

Ownership of property. Fraud or mistake of agent. Forfeiture—Vacancy of buildings. Change in title—General principles; Incumbrances; Making of mortgage; Deed to secure debts. Insurance for the benefit of another—Mortgagees.

IRRIGATION.

Right to appropriate water—Priorities. Extent of appropriation—Abandonment. Appropriation of water on public lands. Acquisition of water rights by prescription. Conveyance of water rights. Reservoirs—Storage of water—Miscellaneous notes.

JUDICIAL SALES.

Power of officer. Sale in parcels or in solido. Confirmation. Rights and liabilities of purchaser. Setting aside on account of fraudulent conduct of purchaser—Return of purchase price. Inadequacy of price. Guardians' sales. Miscellaneous notes.

LANDLORD AND TENANT.

When the relation exists. Estoppel to deny title. Forfeiture and disclaimer. Tenancy at sufferance. Tenancy from year to year. Holding over. Notice to quit. Surrender. Surrender by operation of law. Wrongful eviction by landlord. Appropriation of leased premises under right of eminent domain. Destruction of premises. Illegal use of premises. Farming on the shares—Title to crops. Landlord's lien. Same—Liability of vendee of crops. Rents. Repairs. Miscellaneous notes.

LEASES.

Lease defined. Construction of. Provision for determination of rent by appraisement—Power of courts. Covenants in. Renewals. Assignment. Same—Transfer of privilege of purchasing. Breach of contract to lease—Measure of damages. Miscellaneous notes.

LICENSE.

Creation, definition and revocation of. Assignment of—Adverse holding of transferee.

LIENS.

Judgment liens—Estates to which they attach ; Extent of ; When they take effect ; Writ of elegit ; Creation by filing of transcript ; Judgments of United States Court ; Decrees for alimony ; Penal judgment ; Priority over unrecorded deed ; Priority as between judgments—After acquired real estate ; Cancellation of ; Revival of ; Loss of. Lis pendens—General principles ; What it is notice of ; Amendments ; When it binds subsequent purchasers. Federal court proceedings as a lis pendens—Lien of judgment in state courts. Attorney's lien. Attachment liens. Equitable liens. Lien of legacies. Priority of liens.

MARRIED WOMEN.

Contracts and conveyances. Contracts of suretyship. Estoppels applied to. Equities of, as against creditors of the husband. Miscellaneous notes. Separate real estate—Recent constructions of, and amendments and changes made in, the statutes of the several states and territories since the compilations on this subject in Vol. II, §§ 381-428 ; Vol. III, §§ 470-493.

MECHANICS' LIENS.

Estate to which they may attach and extent of property covered. Kind of labor or material for which claimed. Vendor and vendee. Improvements by lessee. Public buildings. Joint lien on several lots or buildings. Priority of. Lien after death of the property owner. Sub-contractors and material men. Loss or waiver of lien. Filing and recording building contracts. Lien statement—Time for filing ; Allegations as to ownership of property ; Description of premises ; Statement of contract and account ; Mistakes and inaccuracies ; Verification. Enforcement of lien—Complaint ; Parties ; Defenses ; Miscellaneous notes. Construction of statutes and miscellaneous notes.

MINES.

Gas and oil—Nature of property in. Mining leases. Same—Construction of. Miscellaneous notes.

MORTGAGES.

Formal requisities—Execution. Equitable mortgage. Description of debt. Construction of. Title and right to possession. Power of mortgagor to abandon an appurtenant easement. After-acquired property. Future advances. Deeds construed as mortgages. Same—Sufficiency of proof. Priority—As between mortgagees ; As between holders of several notes secured by one mortgage ; Purchase money mortgage. Assumption of mortgage. Same—Surety relation of mortgagor. Assignment of. Recording assignment. Payment to mortgagee after assignment. Payment, release and satisfaction. Penalty for failure to enter satisfaction. Foreclosure—General principles ; Strict foreclosure. Foreclosure by suit—Practice ; Complaint ; Parties ; Defenses ; Usury as a defense ; Statute of limitations ; Personal judgment ; Allowance of

attorney's fees; Adjudication of adverse claims of third parties. Rights of prior incumbrancers. Rights of junior incumbrancers. Sales upon foreclosure by suit. Same—Rights and liabilities of purchaser. Foreclosure by advertisement. Power of sale—General principles; Purchase by mortgagee. Deeds of trust—Sales under. Indemnity mortgages. Miscellaneous notes.

NOTICE.

Constructive notice—Possession; Records. Knowledge of facts sufficient to put one on inquiry. Knowledge by one who acts for another. Service by publication.

NUISANCE.

What constitutes. Who liable for—Estoppel. Legislative and municipal power in respect to. Abatement of—Practice. Continuing nuisance—Successive actions—Damages.

PARTITION.

Partition by life tenant against remainderman not in being. Notice to purchaser at partition sale. Who may have. Parol partition. Practice in actions for. Improvements made and taxes paid. Trial of title in the action. Partition sales.

PARTNERSHIP REAL ESTATE.

What constitutes. Miscellaneous notes.

PARTY WALLS.

When party wall agreements run with the land. Miscellaneous notes.

PLATS AND SURVEYS.

Miscellaneous notes.

POSSESSION.

What constitutes possession of land. Possession as notice.

POWER OF ATTORNEY.

Authority conferred by. Miscellaneous notes. Statutory provisions—Compilation of the statutory provisions of the several states and territories on the subject of power of attorney.

PUBLIC LANDS.

Power of land department—Conclusiveness of its decisions. Power of state courts over. Contracts concerning. Water rights on. Title of state in lands reserved by congress for school purposes. School lands. Swamp lands. "Mining claim" defined—Laborer's lien. Mining lands—Location and relocation; Forfeiture. Tide lands. Town site lands. Grants to railroads. Pre-emption—Homestead. Sale or conveyance of homestead entry. Exemption of homestead lands from debts of patentee. Patents—Issue to heirs of claimant; Erroneous issue—Equitable relief. Conclusiveness of patent. Construction of local statutes. Miscellaneous notes.

QUIETING TITLE.

When the action will lie. Owner of equitable title may maintain. When possession of plaintiff is necessary. What is a cloud upon a title. Practice in the action—Parties; Pleading; Cross-complaint; Pleading equitable titles.

REAL ACTIONS.

Lands in another state—Jurisdiction in personam—Extra Territorial force in rem. Enforcement of decrees and obligations in other states. What is a "judgment" within the meaning of the federal constitution. Jurisdiction—Land in other states or counties; Law of place. Jurisdiction of person—Title in issue. Equitable and legal jurisdiction distinguished. Proceedings after final judgment—Necessity of new notice. Demand and tender. Parties to real actions to protect water rights. Pleadings in real actions. Practice—Amendments; Miscellaneous notes. Judgments. Receivers—Appointment, powers and duties; Liability of for rent. Attorney's fees and costs. New trial as of right. Appeals. When a freehold is involved so as to govern the granting of an appeal. Reversal of judgment—Restitution. Slander of title—Remedy. Former adjudication—What is and who bound by. Former adjudication of title—Presumptions as to pleading—Extent and conclusiveness of decree. Judgment on demurrer. Conclusiveness of judgment as between defendants. Agreed decree—Parol agreement to affect. Former adjudication—Judgments in ejectment and to quiet title. Injunctions—As to when granted; As a remedy for trespass; Mandatory injunctions to compel removal of structures.

REAL ESTATE AGENT.

Authority of. Unsolicited services—Implication of promise to pay for. Principal and agent—Ratification of acts. Purchase of property by agent. When commission is earned, due and payable. Withdrawal or change of terms by vendor. Illegal sales—Recovery of commission. Double commission. Sale by owner.

RECORDS AND RECORDING.

What instruments may be recorded. What is recording. Unrecorded deeds. Destroyed records. Records as notice—Indexes; Two deeds of same land by same grantor—Rights of purchaser under junior deed prior in record. Miscellaneous notes. Time for recording—Recent constructions of, and amendments and changes in, the statutes of the several states and territories since the compilations in Vol. II, §§ 563-611; Vol. III, §§ 638-648.

REDEMPTION.

Change in redemption statute—Impairing obligation of contracts. Right to redeem. Extension of time for. Procedure.

REFORMATION.

When equity will reform instruments. Mutuality of mistakes. Proof necessary.

RESULTING TRUSTS.

Creation of. Transactions tainted with fraud. Trusts implied to prevent fraud. Creation between parties sustaining fiduciary relations. Payment of purchase money by one—Title in another. Purchasing at a judicial for the benefit of another. Creation between husband and wife, guardian and ward. Trusts between husband and wife in fraud of husband's creditors. Proof necessary.

RIGHT OF WAY.

Grants of right of way—Construction of. Possession by railroad company—Farm crossings. Condemnation of right of way—What is a public use; Rights of land owners; Condemnation of another right of way; Damages; Platted lands. Estoppel as against the landowner. Right to exclusive possession of as applied to streets and highways. Crossings

—Streets—Street railways and other railroads. Crossing highways and streets—Duty of railroad as to repairs and approaches. Forfeiture and abandonment of right of way. Sale of right of way as distinguished from a lease thereof.

RIPARIAN OWNERS.

Rights in respect to the use of water and banks. Rights in respect to deep water lines. Accretion and alluvion—Avulsion. Public easement for floatage. Pollution of waters. Rights upon diversion of the stream by natural causes. Improvement of tide lands—Right to purchase.

STARTING FIRES.

Liability of railroads for fires—Negligence. Same—Property “along the route” defined. Pleading and practice in actions for injuries by fire. Measure of damages for injury by fire. Miscellaneous notes.

SPECIFIC PERFORMANCE.

Right of—Equitable principles. Uncertainty of covenants to be performed. Mutuality of contract. Right of specific performance—Particular cases. Parol agreements. Married women. Practice—Chancery powers of the court. Demand and tender.

STATUTE OF FRAUDS.

What contracts are within, and what not. Sufficiency of memoranda. Parol sales or leases. Repudiation of parol contract—Recovery of money paid. Parol sale of equitable interest to one who holds the legal title. Parol gifts. Part performance. Miscellaneous notes.

STATUTE OF LIMITATIONS.

Time necessary to bar an action. When the statute begins to run—General principles; Husband and wife; Trusts and trustees; Subterranean trespass. Laches—Equitable principles; Particular cases; Pleading; Excuses for. Disabilities and exceptions. Cases to which the statute does not apply. Arrest or suspension of the statute.

SURFACE WATER.

What is. Upper and lower estates—Servitude of the latter. Fighting surface water—Common law rule. Common law rule as modified. Right to fight surface water as common enemy—Exceptions to the rule. Liabilities of municipalities.

TAXES AND TAX TITLES.

Exemption from taxes—General principles; Statutes construed. Special assessments; Property of churches and charitable institutions. Assessment of taxes—General principles and statutes construed; Omitted property. Lien for taxes. Discharge of tax lien by payment of amount demanded by the collecting officer. Tax sale—Exhaustion of personal property; Notice of; Time and manner of making; Sale in solido or in parcels. Purchaser at a tax sale—Title acquired by and rights of. Rights of purchaser at an invalid tax sale. Irregularities which avoid or invalidate tax sales. Setting aside tax sales—Practice; Power of legislature to prescribe reasons therefor. Redemption from tax sales—General principles and statutes construed; Notice of expiration of time for redemption. Tax deeds—General principles; Conclusiveness of as evidence of title. Judicial proceedings to collect taxes. Judicial proceedings to confirm and enforce tax-titles. Actions to recover lands sold for taxes—Statute of limitations. Miscellaneous notes and construction of miscellaneous statutes.

TENANTS IN COMMON.

Creation of an estate in common. Conveyance by one cotenant. Trust relation—Buying in titles, etc. Ouster—Rents. Miscellaneous notes.

TREES.

Growing trees. Trees growing on boundary lines—Title and rights of adjoining owners. Miscellaneous notes.

TRESPASS.

As to when the action will lie. Cutting timber to avert peril. Parties, pleading and practice—Equitable remedy. Measure of damages—General principles; Cost of repair; Shrinkage in value. Measure of damages—Wrongful taking of coal.

TRUSTS.

Spendthrift trusts—Power of a grantor to create such a trust in his own favor; Validity as affecting the rights of creditors. Creation of express trusts. Voluntary settlements. Parol proof of express trusts. Construction of trust deeds. Powers, duties and liabilities of trustees. Removal of trustees. Trustee's dealing with the trust estate—General principles; Agents and trustees of corporations. Powers of courts over express trusts. Termination of trusts.

VENDOR AND VENDEE.

As to what constitutes a land contract. Bond for title. Construction of land contract—Assignments. As to when a deed will be treated as an executory contract to convey—Rescission for fraud. Waiver of provisions in land contract. Renunciation of contracts. Abandonment—Earnest money—Forfeiture. Diminution in quantity of land. Good and marketable title—Right of vendee to refuse doubtful title. Purchase money—As to when action will lie for; Right to sue for—Previous conveyance of equity—Tender of deed; Notes maturing at different times—Proceeding when part only are due; Defense of set off on account of incumbrances bought in; Defective title as a defense. Invalid sale—Recovery of purchase money. Vendor's lien—As to when permitted; Priority; Assignment; Enforcement; Loss or waiver of; Statute of limitations—Effect of renewal of note for purchase money.

WASTE.

What constitutes waste. Actions for waste—Practice.

WATERS AND WATER COURSES.

What is a water course. What constitutes navigable waters. Nature and descent of the estate in water rights. Property rights of riparian owners. Mills and milldams—Right of flowage. Navigable streams—Rights of loggers. Use of waters—Diversion by riparian owner. Measure of damages for diversion of flowing water.

WILLS.

As to what is a will—Validity of devises. Construction of wills—As to when a fee is devised; Cases depending upon particular facts. Description of property—Mistakes. Recitals in wills. Restraints upon alienation—Perpetuities. Powers—Construction of wills in reference to. Execution of testamentary power. Per capita or per stirpes. As to what is after-acquired property. Revocation. Lapsed devises—As to who is relative. Charge of legacies upon lands devised. Dower—Devise and bequests in lieu of. Widow's election—Estoppel to make.

ABSTRACTERS.

EPITOME OF CASES.

Sec. 1. Right of abstracter to use public records. In a recent case the authorities are reviewed and it is held by a divided court, that while every person has the right of access to the public records of the county clerk's office, without the payment of fees to the clerk, to examine any title in which he is interested, subject to reasonable rules and regulations, and has the same right of access to the records when employed to examine and guaranty the title to a particular piece of property for another, he has not the right to occupy the office of the clerk for the purpose of making an abstract of the records, in order to set up and establish a rival business to the clerk. *Barber v. West Jersey T. & G. Co.*, 58 N. J. Eq. 158 (82 Atl. Rep. 222). In the majority opinion, the court say: "The law makes it the duty of the clerk to take care of the public records in his office, but gives him no special fees for such service. The only compensation to him are the fees he receives in the ordinary course of his business for searches. To extend the right of search by others beyond this limit will deprive the clerk of the only remuneration he can have for the performance of this duty. In the absence of clear expression, it should not be so enlarged by construction." In the dissenting opinion, Magie, J., says: "In my judgment, the right of respondent to the examination of the records, which appellant denies, has been settled at law. Respondent is engaged in the lawful business of insuring, guarantying, and certifying titles to land. This business requires the examination of all records affecting such titles. While the successful conduct of its business may incidentally diminish the fees of the clerk, such result is merely incidental, and he has no vested rights to such fees. This doctrine was the ground of the decision of the court in *Lum v.*

McCarty, 80 N. J. Law, 287." For a case with annotations see 2 Ballards' Annual, §§ 1-4. See also 3 Ballards' Annual, § 1.

Sec. 2. Mistakes in abstracts—Liability of abstractor to third parties. It is held that an abstractor is not liable to the assignee of a mortgage note for defects of title not noted by him in an abstract furnished for the mortgagee, it not being shown that he had knowledge that the note was to be assigned or that such assignee was to rely upon the abstract, or that it was for his use. *Talpey v. Wright*, 61 Ark. 275 (32 S. W. Rep. 1072). The court say: "There is no allegation in this complaint from which we can infer that the appellees contracted with Rhea to prepare an abstract for the use and benefit of the appellant, Talpey. They furnished an abstract to Rhea, for the use and information of Hoover and the Topeka Investment & Loan Company. Upon the abstract so furnished a loan was made to Rhea by such company. If we concede that Hoover or the Topeka Investment & Loan Company would, under the circumstances, have a right of action against the makers of the abstract for an injury to them occasioned by defects therein, still it would not follow that appellant had a right of action. After the loan had been made, and the abstract had served the purpose for which it was prepared, the appellant purchased the notes executed by Rhea, which were secured by a trust deed on land. The appellant alleges that, before making such purchase, he required of the company that it furnish him an abstract of title, and that the company furnished him the abstract prepared by the appellees, upon which he relied. This action of the Topeka Investment & Loan Company might make it liable for defects in the abstract furnished by them to appellant, but, in the absence of any allegation that they were acting as the agent of appellees in furnishing such abstract, it would not affect the liability of said appellees. The appellees did not contract to furnish the abstracts to appellant, nor to any one for his use and benefit. We think it clear that he has no right of action against them."

Sec. 3. Admissibility of abstracts in evidence. Under the Illinois statute, 2 Starr & C. Ann. St. c. 116, par. 29, § 24, the burden is upon the party offering the abstract in evi-

dence to bring it within the statute which requires that the abstracts shall have been made in the ordinary course of business, prior to the loss or destruction of the originals, to entitle them to be read in evidence. If the offered abstracts bear date prior to the Chicago fire, and purport to have been made by abstracters, who are shown to have then been in the abstract business, and the handwriting is proven to be genuine by another abstracter who has made continuations of them, they should be admitted in evidence. *Chicago & A. R. Co. v. Keegan*, 152 Ill. 413 (39 N. E. Rep. 88). The court say: "If the statute is to receive a fair interpretation, and such as will effectuate the intention of the legislature, it will not do to require absolutely that a witness must appear upon the stand who is able to testify from his own actual personal knowledge and recollection that the abstract sought to be availed of was made in the ordinary course of business, and prior to the loss or destruction of the original deed or instrument. If the true intent and meaning of the statute require that much, then the tenure of owners of unoccupied real estate in Cook county is precarious indeed."

ABUTTING OWNERS.

PENN. R. CO. V. MONT. COUNTY PASS. RY. CO.

(167 Pa. St. 62.)

Street railway on county highway — Rights of abutting owner. Where a street railway company is not clothed with the power of eminent domain, as against an abutting owner upon a country highway, it cannot construct its line upon such highway without his consent, even though it have the consent of the township authorities. The easement of the public in a street in a town or city includes the right to occupy with a street railway, but the easement in a country highway is for passage only.

Street railway—Right to build part before acquiring the right to complete the line. Under the Penn. Statute, a street railway company cannot commence the construction of a part of its line until it has acquired the right to construct the entire line.

WILLIAMS, J.

Sec. 4. History of street railway legislation—Statement of case. Our system of street passenger railways had its origin in the days of special legislation. Each company then had its own act of incorporation, in which its route was described and its powers defined. These companies were confined to the cities and large towns of the state, and their cars were moved by horse power, and were a substitute for the omnibus and other vehicles devoted to the carriage of passengers, which had been previously in common use. After the adoption of the new constitution the practice of separate legislation for each company became impracticable, and in 1878 a general law was passed providing for the organization of street railway companies for the purpose of “constructing, maintaining and operating a street railway for public use in the conveyance of passengers.” No power of eminent domain was conferred on these companies, but the several provisions of the act show that such railways were to be constructed upon the streets, conforming to the grade of the streets, and subject to the regulation of the municipal authorities. The act of 1876 gave to street railway companies, in cities of the first class, the right to “use other than animal power” in the movement of their cars. The act of May, 1878, conferred the like right upon street railway companies in cities of the second and third classes. The general law further provided that any company organized under its provisions should maintain an office for the transaction of its business “in the city” where its railway was located. All these provisions show that the street railways contemplated by the general act of 1878 were intended for the accommodation of the crowded streets of cities, and for no other purpose. The present general law relating to these corporations was passed in 1889. It was intended to bring together the valuable provisions of several acts of assembly into one comprehensive statute, and to make some changes that experience had shown to be desirable. It authorized the incorporation of five or more persons for the purpose of “constructing, maintaining and operating a street railway on any street or highway upon which no track is laid or authorized to be laid” under existing charters, with the privilege of occupying “any street” by any power other than

by locomotive. It required the route to be set out in the application for incorporation, stating the streets and highways upon which it was to be built, and showing "the circuit of the route, the amount of the capital stock of the company," and other particulars. It required all companies incorporated under its provisions to maintain an office where the railroad was located. Section 15 provided that "no street passenger railway shall be constructed by any company incorporated under this act within the limits of any city, borough or townships without the consent of the local authorities thereof; nor shall any street passenger railway be incorporated hereunder which shall not have a continuous route from the beginning to the end, forming a complete circuit with its own track, excepting the five hundred feet to be used under Section 14 hereof."

Sec. 5. Distinction between the easement in a street and the easement in a country highway—Rights of abutting owners. From these provisions, we think it is apparent that the attempt now being made to convert these city conveniences into long lines of transportation, connecting widely-separated cities and towns by electric railways traversing country roads, was not anticipated or provided for by the legislature. The failure to confer upon these companies the power of eminent domain would, if it stood alone, be sufficient to justify this conclusion. The land taken for streets in cities and boroughs is in the exclusive possession of the municipality which may use the footway as well as the cartway for any urban servitude without further compensation to the lot owners. *Provost v. Water Co.*, 162 Pa. St. 275 (29 Atl. Rep. 914); *City of Reading v. Davis*, 153 Pa. St. 860 (26 Atl. Rep. 62); *McDevitt v. Gas Co.*, 160 Pa. St. 367 (28 Atl. Rep. 948). Nor does the construction of a street passenger railway upon the surface of the street impose any additional servitude upon the property fronting on the street so occupied. *Rafferty v. Traction Co.*, 147 Pa. St. 579 (23 Atl. Rep. 884; 30 Am. St. Rep. 763). But the easement acquired by the public by proceedings under the road laws is an easement for passage only. The owner is entitled to the possession of his land for all other purposes. We held, therefore, in *Sterling's*

Appeal, 111 Pa. St. 85 (2 Atl. Rep. 105; 56 Am. Rep. 246), that the occupancy of a country road by a pipe line imposed an additional servitude upon the farm owner, while in *McDevitt v. Gas Co.*, 160 Pa. St. 367 (28 Atl. Rep. 948), we held that a pipe line laid within the limits of the street by authority of the city did not impose any additional servitude on the lot owner. The reason for the distinction is fully stated in the opinion in the latter case. The same distinction exists, and for the same reasons, between urban and suburban property, as to the right of corporations to occupy a highway for a street passenger railway. This, as will be seen by the cases cited above, is an urban servitude, to which suburban property has not been subjected by law, up to this time. The consent of township authorities justifies an entry upon the public road, so far as the public is concerned; but the supervisors of the townships have no power to bind private property, or subject it to a servitude, for the benefit of any person or corporation other than the township and the public it represents. The carriage of passengers through the township, on their journey from one city or borough to another, by rail, is in no sense a township purpose; and whether these passengers make their journey in cars drawn by a locomotive over a steam railroad, or in those propelled by electricity over tracks laid upon the highways, is immaterial both to tax-payers and to landowners along the route traveled, except as the adoption of one or the other of these modes of transportation may affect the township roads, or the private property of citizens. When the supervisors give their consent to the occupation of the township roads by a street railway, they speak as the representatives of those who build and those who use the roads, but not as the representatives of the private property over which the roads pass. The street-railway companies cannot reach the property owners either through "the local authorities," or by the right of eminent domain, as the law now stands; and it is not easy to see how such a company can protect itself in the use of country roads except by contract with every owner of property along the roads they wish to occupy. The trouble is that the supposed needs of the country have outgrown its legislation, and an effort is now being made to adapt street railways to purposes for which they were never intended, and

for which the existing legislation relating to them was not framed.

Sec. 6. Municipal power over streets and highways
—Distinction between cities and towns, and townships
—Rights of abutting owners. Cities and boroughs possess the necessary power over their streets to enable them to authorize their use by a street railway. Townships do not possess municipal powers, and, under existing laws, their control over the public roads is limited. But in this connection another interesting question suggests itself. How is the assent of the "local authorities" to be obtained in any given case, and what is the proper evidence that it has been given? The township books, in the custody of the town clerk, are the records of the township, and should afford evidence of the action taken by the supervisors in all matters of public importance. A paper in the pocket of a contractor or of some officer of a corporation is not the proper evidence of action by the township or school district. The action needed is not that of the individuals who compose the board, but of the official body. Thus it was held that a contract signed by the members of the school board separately did not bind the district. The best evidence of their official action was their minutes kept by the secretary. *Wachob v. School Dist.*, 8 Phila. 568. For the same reason a contract signed by the president and secretary was held to be invalid. It had not been acted upon by the board when in session. *School Dist. v. Padden*, 89 Pa. St. 895. One supervisor may bind the township by an act that is ministerial in its character. *Dull v. Ridgway*, 9 Pa. St. 272; *Pottsville Borough v. Norwegian Tp.*, 14 Pa. St. 548. Not so, however, when the act is one that requires deliberation and the exercise of judgment. *Cooper v. Lampeter Tp.*, 8 Watts, 125; *Union Tp. v. Gibboney*, 94 Pa. St. 584; *Somerset Tp. v. Parson*, 105 Pa. St. 860. In such cases the supervisors must be together, and their action must be taken in their official character, and should appear upon the township book kept by the town clerk. If not so taken, it does not bind the township, and has no validity whatever. The supervisors should consider and deliberate upon any application made to them for leave to oc-

cupy any of the township roads with a street railway. If they decide to grant the application upon certain terms and conditions, as to the manner and extent of the occupancy permitted and the extent of repairs to be required, these terms should appear in the record of the meeting, as well as the consent; and a contract that does not rest on such official action, properly taken by the proper officers, is utterly worthless. But we know as a matter of current history, that street railways have been projected, and actually constructed, and are now in operation, over country roads, where no legal consent has been obtained, and where no attention has been paid to the rights of property holders. Such railways cannot now be torn up or enjoined either by the township officers, or at the instance of landowners along their routes. Where such enterprises have been allowed to proceed, and the expenditure of large sums of money has been permitted, it would be inequitable to correct at this time what was a mutual mistake, under the influence of which these enterprises have been pushed to completion; but it would seem desirable that such charters should not be granted in future until the legislature has made such provision for the assessment of damages to property as shall protect the owners from the additional servitude which the construction of electric railways does certainly impose upon all adjoining owners outside municipal boundaries. At present an action at law is the only remedy within the reach of an injured person who has suffered a railway to be built across his land without objection; but equity will interpose to protect him, if he comes in proper time, by enjoining the construction until his damages have been paid or secured to his satisfaction.

Sec. 7. Street railway—Right to build part before acquiring the right to complete the line. The only remaining question raised in this case is over the right of a street railway to build any part of its line before it has the right to complete it. A steam railroad may enter upon any part of its line, and commence building, subject only to its duty to complete the line in accordance with its charter. The reason of this is that it is clothed with the power of eminent domain, and may enter and appropriate land regardless of the will of

the owner. A street railway company, as we have seen, does not possess the power of eminent domain. It cannot build under its charter alone. It must have the consent of the proper municipal or local authorities, or it cannot move. If the proposed line passes through a city, borough, or township intermediate the termini, and that city, borough, or township refuses its permission, the power to build the road described in the application and charter cannot be exercised. It must be possible for the company to complete its line before it has a right, as against any city, borough, or township into which its line extends, to begin work. It is not possible for such company to complete its line without the consent of the local authorities of the districts through which it passes; and, where this is refused in one or more of the municipal or quasi municipal divisions through which its line runs, the building of its proposed road under its charter is an impossibility. Let us suppose, for purposes of illustration, a charter to authorize the construction of a street railway from A., through certain roads in B., C., and D., to the city of E., and that consent has been obtained from the local authorities of A., of C., and of E., but refused by the local authorities of B. and D. The proposed line is thereby cut up into three wholly unconnected pieces. It is very clear that, under a charter authorizing the building of a line of road from A. to E., the company could not lawfully build three distinct local roads, viz.: One in A., another in C., and the third in E. The consent given by A. to the construction of the line of road authorized by the charter would not estop the local authorities from objecting to the construction of a local road within its own limits. When confronted with its own consent, A. could well reply, "The road to which consent was given is not the road you are now building, for the building of that road has become impossible by the action of the authorities of B. and D."

Sec. 8. Railway corporations—Needed legislation. The learned judge of the court below said in the conclusion of his opinion, "Corporations of this character are multiplying rapidly, and we may assume they are demanded by the public." This is a strong reason for meeting the questions involved in this case squarely, that the legislation needed to

protect property owners against this class of corporations may be had at the same time that the powers necessary to convert what was intended as an urban convenience into a general mode of transportation are considered and conferred by the lawmakers. In this case the defendant's line of so-called street railway extends through two boroughs, two townships, and over one county bridge over the Schuylkill river. The line and circuit of its road over the several highways to be occupied are fully set forth in its charter. The consent of the local authorities of West Conshohocken borough and of White Marsh township were refused. That of Upper Merion township was given. That of the borough of Conshohocken was given, and has since been withdrawn. Under such circumstances the building of the line of street railway described in and authorized by the charter is impossible, and the company has no right to proceed. The conclusions of the learned master were correctly drawn, and the decree recommended by him should have been made. The decree appealed from is now reversed, and the record remitted, with direction to the court below to make the decree recommended by the master, awarding the injunction prayed for. The costs of this appeal to be paid by the appellee.

Note. An abutting owner has such an interest in the street as will enable him to maintain an action to enjoin the unauthorized construction of a street railway. *Thomas v. Inter-Co. St. Ry. Co.*, 167 Pa. St. 120 (31 Atl. Rep. 476). Where the construction and operation of a street railway will amount to an obstruction of the street for other purposes, an injunction will lie to prevent its construction although it has been authorized by a city ordinance. *Schulenburg & Boeckler L. Co., v. St. Louis R. & N. W. R. Co.*, 129 Mo. 455 (31 S. W. Rep. 796.) For a collection of authorities on what constitutes, generally, an additional burden on a highway or street, see note 17 L. R. A. 474. See also Ballards' Annual, Vol. 1, § 517, Vol. 2, § 204 and Vol. 3, § 266.

EPITOME OF CASES.

Sec. 9. Ownership of fee—Removing earth—Vacation of way—Rights of abutting owner. In Indiana the owner of lands adjoining a highway is ordinarily the owner of the fee in the highway subject to the easement of the public. Where a road supervisor digs up gravel or earth within the

limits of a public highway, not for its improvement at that point, nor for the purpose of bringing the highway there to the desired grade, but merely for the purpose of obtaining material for improving the highway at some place remote from the owner's land, the act cannot be regarded as a proper exercise of the municipal power. To justify the supervisor, the removal must be for the improvement of the highway, and not merely the replacing of the material at the remote point. *Anderson v. Bement*, 18 Ind. App. 248 (41 N. E. Rep. 547). *Citing*, Elliott, Roads and S. 528; 2 Beach, Pub. Corp. § 1145; 2 Dill. Mun. Corp. §§ 687-689. The abutting owner's right to his portion of a vacated alley or street, as between him and the opposite owner, does not depend upon the legality of the vacation. *Bigelow v. Ballerino*, Cal. (41 Pac. Rep. 14). For distinctions on account of the ownership of the fee, see Ballards' Annual, Vol. 2, § 6. For reason of the rule, see Vol. 8, § 8.

Sec. 10. Change of grade—Liability of municipality. Damages may be recovered for injury resulting from a change in the grade of a street by a municipal corporation. *City of Joliet v. Blower*, 155 Ill. 414 (40 N. E. Rep. 619); *Town of West Covington v. Schultz*, Ky. (80 S. W. Rep. 410, 660). Where the constitution of a state provides that private property shall not be taken "or damaged" for public use, except on due compensation, it is held that where private property has sustained a substantial damage by the making and using of an improvement that is public in its character, it does not require that the damage shall be caused by a trespass or an actual invasion of the owner's real estate, but if the construction and operation of the railroad or other improvement is the cause of the damage, though consequential, the party damaged may recover; and that this rule applies to the changing of the grade of a street to the injury of the property of an abutting owner. *Mayor, etc., of City of Vicksburg v. Herman*, 72 Miss. 211 (16 So. Rep. 484). Where a street is graded under void proceedings and shade trees cut and removed, the actual damage to the abutting owner can be recovered without regard to the benefit to his land in general by the improvements of the street. *Fisher v. Naysmith*, Mich. (64 N.

W. Rep. 19). In order to recover damages against a city on account of the change of grade of streets, the plaintiff must have either a legal or equitable estate in the property injured. A husband who has erected improvements on the land of his wife, and is in possession thereof, is not entitled to recover in his own name for damages sustained by said property by a change of grade. *Nebraska City v. Northcutt*, 45 Neb. 456 (63 N. W. Rep. 807). It is held that a property owner, who, after the adoption of an ordinance changing the grade, signs a petition for improvements to the street in accordance with such ordinance, will be estopped from claiming damages resulting from the improvements so made. *Preston v. City of Cedar Rapids*, Ia. (63 N. W. Rep. 577). In order that a city may be liable for damages occasioned by a change of grade of its streets, such change must be the approximate cause of the injury complained of. *In re Tucker and Frankford Sts.*, 166 Pa. St. 336 (31 Atl. Rep. 117). Iowa Code, § 469, provides that "when any city or town shall have established the grade of any street or alley, and any person shall have built or made improvements on such street or alley according to the established grade thereof, and such city or town shall alter said established grade in such a manner as to injure or diminish the value of said property, said city or town shall pay to the owner or owners of said property so injured the amount of such damage or injury." It is held that the fact that the changed or final grade is on a line with the natural surface of the street does not prevent a recovery under this statute. *Ressegieu v. Sioux City*, Ia. (63 N. W. Rep. 184; 28 L. R. A. 389).

Sec. 11. Change of grade—Measure of damages. The measure of damages occasioned by a change of grade is the difference in value of the premises before and after the change. *May v. Carbondale Traction Co.*, 167 Pa. St. 343 (31 Atl. Rep. 667). The supreme court of Missouri says: "The general rule is that, when the reasonable cost of repairing the injury by restoring the premises to their former condition as near as may be is less than the diminution in the market value of the property by reason of the injury, such cost of restoration is the proper measure of damages. On the other

hand, when the cost of restoring is more than such diminution, the latter is generally the true measure of damages, and proof of the cost of restoring the land to its former condition and proof of the diminution in the market value are both admissible on the question of damages to be awarded for an injury thereto." *Smith v. Kansas City*, 128 Mo. 28 (80 S. W. Rep. 814). Citing, *Kansas City v. Morton*, 117 Mo. 446 (28 S. W. Rep. 127); *Hartshorn v. Chaddock*, 185 N. Y. 116 (31 N. E. Rep. 997; 17 L. R. A. 426); *Taylor v. Railway Co.*, 38 Mo. App. 668; *City of Topeka v. Martineau*, 42 Kan. 388 (22 Pac. Rep. 419); *City of Chicago v. Taylor*, 125 U. S. 161, 8 Sup. Ct. 820; *Holt v. Sargent*, 15 Gray 97. In a suit against a city for change in the grade of a street cutting off access to plaintiff's property, it is proper to show in mitigation of damages, improvements which the city has under contract to remedy the defects complained of, although their construction has not yet been begun. *City of Joliet v. Blower*, 155 Ill. 414 (40 N. E. Rep. 619).

Sec. 12. Obstruction of a way by the municipality. It is held by the supreme court of Virginia that a city whose legislative charter gives it the power to close, extend, widen or narrow its streets and build bridges, may erect an approach to a bridge over a railroad which materially obstructs the street, without being liable to the abutting owners for damages caused by such structure, on the ground that the acts done are in the proper exercise of governmental powers and not directly encroaching upon private property. *Home Bldg. & Conv. Co. v. Roanoke*, 91 Va. 52 (20 S. E. Rep. 895; 27 L. R. A. 551). A city may be enjoined from unnecessarily changing the line of a street to the great injury of abutting property owners. *Delashmutt v. Oskaloosa*, Ia. (62 N. W. Rep. 16). Under the Iowa Code, § 946, damages cannot be recovered by a landowner on account of the vacation of a public highway. *Grove v. Allen*, Ia. (61 N. W. Rep. 175).

Sec. 13. Adjacent owner—Damages upon vacation of street. In a recent case the supreme court of Indiana collates and reviews the authorities and holds that one whose access is not cut off, and whose property rights in the immedi-

ate front of his lot are not invaded, and who suffers only from the loss of convenience of access, which of itself may turn the tide of travel from his premises, and occasion loss of business and depreciation in value of property, sustains damage of the same kind, but in greater degree, than that sustained by the public generally, and is without remedy. *Dantzer v. Indianapolis U. Ry. Co.*, 141 Ind. 604 (39 N. E. Rep. 223; 50 Am. St. Rep. 343). For a leading case upon this subject with annotations, see, *Ballards' Annual*, Vol. 3, §§ 3-7. If compensation is allowable on the vacation of part of a street in a city of the third class, the validity of a vacating ordinance not providing for the assessment and payment of damages, which is treated as valid by the city and the owners of property immediately abutting on such vacated part of the street on both sides, cannot be successfully challenged by a person not shown to have an interest in any real property abutting on the street. *Arnold v. Weiker*, 55 Kan. 510 (40 Pac. Rep. 901).

Sec. 14. Assessments against abutting owners. In a recent case it is held by the supreme court of South Carolina that a statute authorizing city authorities to assess abutting owners the whole or part of the cost of grading, paving, or otherwise improving public streets, is unconstitutional on account of being in conflict with Art. 9, § 8, of the constitution of that state requiring taxes to be uniform with respect to persons and property. *Maudlin v. City Council of Greenville*, 42 S. C. 293 (20 S. E. Rep. 842; 27 L. R. A. 282; 46 Am. St. Rep. 723). In Pennsylvania it is held that the property abutting on a street being liable for the first paving of the street only, is not liable for further paving where a highway which had previously been macadamized is adopted and assimilated with the rest of the city streets. *Leake v. Philadelphia*, 171 Pa. 125 (32 Atl. 1110). Where a strip of ground surrounding a tract of land designed for a public park was conveyed by parties who owned other land outside of and abutting upon the said strip upon the express conditions in the deed of conveyance that the grantee should lay out and improve said strip as a street, and forever after keep the same in good repair and order, at its own expense, such city, for improving or keeping

in repair such street, cannot require payment by its grantors because of their ownership of the aforesaid abutting property, and the same exemption from liability exists in favor of one who has since purchased a part of said abutting property. Under the above circumstances, an injunction will lie to restrain a sale being made by the city of any of the abutting property aforesaid, and against the collection from any owner of such adjacent property of the cost of improving or of keeping in repair any portion of said street. *City of Omaha v. Megeath*, 46 Neb. 502 (64 N. W. Rep. 1091).

Sec. 15. Railroads in streets—Abutting owner's rights. An abutting owner may recover damages on account of the construction of a railroad in the street under a grant from a city even though the grant fails to so provide. *Kaufman v. Tacoma, O. & G. H. R. Co.*, 11 Wash. St. 682 (40 Pac. Rep. 137); *Maysville & B. S. & R. Co. v. Ingram*, Ky. (80 S. W. Rep. 8). The laying of a track for mere temporary use which does not unreasonably abridge the abutting owners rights is not sufficient. *Chesapeake & O. Ry. Co. v. Kobs*, Ky. (80 S. W. Rep. 6). An abutting owner may recover damages from a railway company for the negligent obstruction of a culvert in the street for the passage of water. *Henry v. Ohio R. R. Co.*, 40 W. Va. 284 (21 S. E. Rep. 863). Trespass will not lie against a railroad to recover damages by reason of its occupation and use of the street by one who purchased the abutting property after the appropriation by the railway company, and the laying of a second track by the company within the limits does not constitute a new or distinct act of trespass. And the right of action for damages by reason of the construction of the railroad inures to the prior owner of the abutting lots and is not assigned by conveyance thereof. *Galt v. Chicago & N. W. Ry. Co.*, 157 Ill. 125 (41 N. E. Rep. 643). See Ballards' Annual, Vol. 2, §§ 10, 11, and Vol. 3, §§ 11-15.

Sec. 16. Side track for storing cars. It is held that a city has no power by ordinance to authorize a railway company to use a street for a station or side-track for storing cars. *Stevenson v. Missouri Pac. Ry. Co.*, Mo. (81 S. W. Rep. 793). The court say: "The power of the city of Harri-

sonville to grant to defendant company, by ordinance, the right to construct along and upon its streets a railroad track, at grade, and to operate its trains thereon, is not questioned. Such power was held to exist in municipal corporations having control of their streets, by this court, in *Lakland v. Railroad Co.*, 31 Mo. 180, and in *Porter v. Railroad Co.*, 33 Mo. 128. But the track must be laid upon the grade of the street and not below or above it. If laid so as to obstruct the access to the property of adjacent owners, and not on grade, the company will be liable to such persons for damages. *Cross v. Railroad Co.*, 77 Mo. 318. The use of a street by a railroad for such purposes is not a perversion of the street; such use being for the benefit of the public, and not inconsistent with its general use and purpose. But when a street is to be used for switch and side-track purposes, by standing cars thereon—cars or trains of cars—then a different rule prevails; for such use is a perversion of the street, and inconsistent with its general use. *Tate v. Railway Co.*, 64 Mo. 149, was a suit to recover damages for injury to four lots adjoining a street in the city of Moberly. The petition alleged that defendant, in the construction of its road on said street, erected an embankment from three to seven feet high in front of said lots, and allowed its cars, coaches, and trains to stand on the track, whereby the use of said street was destroyed, and ingress and egress to and from plaintiff's lots prevented; and an instruction which told the jury: 'If defendant constructed its railroad on the street in front of plaintiff's lots, by making an embankment or grade along the line of the street, and placed thereon cross-ties and track for its road, and uses the same for switch or side-track purposes, by standing thereon cars, or trains of cars, and thereby has unreasonably and materially obstructed the use of said street, or has materially obstructed the way to and from said lots, so as to lessen the value of plaintiff's lots, the jury will find for the plaintiff,' was approved. See, also, *Cross v. Railway Co.*, 77 Mo. 318. The use of the street for such purposes would destroy its use as a public thoroughfare. *Dubach v. Railroad Co.*, 89 Mo. 488 (1 S. W. Rep. 86). So it has been held that an obstruction in a street may be both a public and private nuisance, and that an abutting property owner who sustains a special injury

may have injunctive relief. *Schopp v. City of St. Louis*, 117 Mo. 131 (22 S. W. Rep. 898; 20 L. R. A. 788). A similar rule was announced in the recent case of *Lockwood v. Railroad Co.*, Mo. Sup. (26 S. W. Rep. 698). From these considerations it seems clear that the city of Harrisonville had no authority to authorize defendant to build, maintain and operate side tracks, switches, depot stations and approaches thereon, on Grand avenue, in said city, and, in so far as it attempted to do so by ordinance, that said ordinance is void, and of no force or effect.

We do not intend to be understood, from what has been said as holding that the construction of a railroad track upon and along a street in a city or town is not the imposition of an additional servitude, and such damage to the property of persons abutting on such street which would not entitle them to compensation therefor, within the meaning of § 21, Art. 2, Const., which provides 'that private property shall not be taken or damaged for public use without just compensation.' We are aware that it has been held in a long line of decisions, beginning with *Lackland v. Railroad Co.*, and ending with *Lockwood v. Railroad Co.*, that the laying of a steam railway in a street was not subjecting the abutting property to an additional servitude or different purpose from that originally designed, but we are not at all satisfied with the reasoning of those cases, and hold ourselves free to express a different view should the question again come before us."

Sec. 17. Elevated railroads. The right to condemn property for a right of way of an elevated railroad given by a city ordinance which specifies the route will be limited to that route. *Tudor v. Chicago & S. S. Rapid Transit R. Co.*, 154 Ill. 129 (39 N. E. Rep. 136). Where there is no actual taking or invasion of the abutting owners' property, and the benefits of the elevated road, as shown by the increase of values, exceed the consequential damages, none can be recovered. *Bookman v. New York El. R. Co.*, 147 N. Y. 298 (41 N. E. Rep. 705; 49 Am. St. Rep. 664); *Malcolm v. New York El. R. Co.*, 147 N. Y. 308 (41 N. E. Rep. 790). The Md. Code, Art. 23, § 169, provides that where any railway company occupies with its tracks the streets of a city, it shall be responsible for

injuries done by the location of its tracks to private property lying upon or near to the street so occupied. Under this statute it is held that one who is a lessee of property, not actually abutting on a street occupied by an elevated railroad, may recover from such company for the diminution in the usable value of the premises. *Lake Roland El. Ry. Co. v. Webster*, 81 Md. 529 (32 Atl. Rep. 186). For a case which depends upon particular facts, and which illustrates what amounts to an abandonment of the abutting owner's easement in the street in favor of an elevated railroad, see *Foote v. Metropolitan El. Ry. Co.*, 147 N. Y. 367 (42 N. E. Rep. 181). Proof of a substantial and continuing injury to the rental value of the abutting premises will sustain an action for ejectment against an elevated railroad, although the fee value of the property is not depreciated, on the ground that the wrong done is in the nature of a continuing trespass and involving a multiplicity of actions. *Haight v. Littlefield*, 147 N. Y. 838 (41 N. E. Rep. 696).

ACKNOWLEDGMENTS.

EPITOME OF CASES.

Sec. 18. Before whom acknowledgments may be taken. Where the conveyance is to a trustee, with power of sale conferred on him for the payment of debts, the trustee is disqualified, as any other grantee would be, to take the acknowledgment of the grantor. *Holden v. Brimage*, 72 Miss. 228 (18 So. Rep. 388). Citing, *Stevens v. Hampton*, 46 Mo. 404; *Brown v. Moore*, 38 Tex. 645; *Tavener v. Barrett*, 21 W. Va. 656; *Bowden v. Parrish*, 86 Va. 67 (9 S. E. Rep. 616; 19 Am. St. Rep. 873); note to *Withers v. Baird*, 32 Am. Dec. 757. Where authority to take acknowledgments is conferred upon a certain class of officers by two statutes the repeal of one does not deprive such officers of such authority. Cal. Code, Civ. Proc. § 259; Civ. Code, § 1181, construed. *Malone v. Bosch*, 104 Cal. 680 (38 Pac. Rep. 516).

Sec. 19. Form and sufficiency of certificate. Where the certificate states that the officer taking the acknowledgment is a notary public it is not necessary that his signature thereto be followed by the words "notary public." *Lake Erie & W. R. Co. v. Whitham*, 155 Ill. 514 (40 N. E. Rep. 1014; 28 L. R. A. 612; 46 Am. St. Rep. 855). See article on Form of Deeds. The certificate of acknowledgment to a tax deed, in the absence of some special statute to the contrary, should conform to the general statutory form of acknowledgments. Ala. Code §§ 592, 1802, applied. *Jackson v. Kirksey*, Ala. (18 So. Rep. 804). A certificate of acknowledgment to a mortgage executed by a husband for himself and as attorney in fact for his wife, which contains the usual acknowledgment on his own behalf and continues as follows: "And I do further certify that personally appeared P. V., personally known to me to be the same person whose name is subscribed to the within instrument as the attorney in fact of M. V., his wife, and the said P. V. duly acknowledged to me that he subscribed the name of M. V. thereto as principal, and his own name as attorney in fact," was held sufficient. *Richmond v. Voorhees*, 10 Wash. St. 816 (88 Pac. Rep. 1014).

Sec. 20. Conclusiveness of the certificate. A certificate of acknowledgement, is, in the absence of fraud or duress, conclusive of the facts therein stated, *Carr v. H. C. Fricke Coke Co.*, 170 Pa. 62 (82 Atl. Rep. 656); but it does not tend to establish the existence of other facts. *Spencer v. Reese*, Pa. St. (80 Atl. Rep. 722). It is not conclusive as to the mental capacity of the party making the acknowledgement. *Thompson v. New Eng. Mort. Sec. Co.*, Ala. (18 So. Rep. 315). In the absence of fraud, mistake or duress, the jurisdiction of the officer and his compliance with the statutory requirements appearing, his certificate cannot be collaterally attacked by parol evidence. *Read v. Rowan*, 107 Ala. 366 (18 So. Rep. 211); *Keith v. Silberberg*, Ky. (29 S. W. Rep. 816), applying, Ky. Gen. Stat. ch. 81, § 17. An officer will not be heard to impeach his certificate of an acknowledgment made before him. *Shapleigh v. Hull*, 21 Colo. 419 (41 Pac. Rep. 1108). Where it is

admitted that the parties executing an instrument signed it before the acknowledging officer, no fraud or duress being shown, the officer's certificate in proper form cannot be impeached by parol evidence. *American Freehold L. M. Co. v. James*, 105 Ala. 347 (16 So. Rep. 887).

Sec. 21. Proof by subscribing witnesses. The affidavit of a proving witness, under S. C. Rev. Stat. 1872, p. 188, ch. 28, § 5, otherwise regular in form and sworn to before a proper officer, need not necessarily be signed by the affiant. *Armstrong v. Austin*, S. C. (22 S. E. Rep. 768; 29 L. R. A. 772). Mill & V. Tenn. Code, § 2878, construed and applied—probate of deeds by witnesses before the clerk of the county court. *McGuire v. Gallagher*, 95 Tenn. 349 (32 S. W. Rep. 209).

Sec. 22. Acknowledgments by married women. Under Pa. Act, February 24, 1770, the certificate of a married woman's acknowledgment must show her separate examination by an officer, that she was made acquainted with the contents of the deed, and voluntarily consented to its execution. *Spencer v. Reese*, Pa. St. (80 Atl. Rep. 722). Her invalid acknowledgment may be cured by a new acknowledgment made according to law. *Chester v. Breitling*, 88 Tex. 586 (32 S. W. Rep. 527). In Alabama it is held that where a justice of the peace takes a married woman's acknowledgement of a conveyance of her homestead outside of his own county the acknowledgment is void. *New Eng. Mort. Sec. Co. v. Payne*, 107 Ala. 578 (18 So. Rep. 164).

Sec. 23. Curative Statutes. Under a statute (Ia. Acts 20th Gen. Assem., ch. 203), which validates deeds and conveyances of lands within that state executed out of such state, which "have been acknowledged or proved according to and in compliance with the laws and usages of the state" where executed, it is held, that where one claims under such a deed and shows that the state in which the same was executed has no statute prescribing the form or contents of an acknowledgment, he must show the usage of such state with respect to such form, and that the same has been complied with. *Krueger v. Walker*, Ia. (68 N. W. Rep. 320). Wash. Laws.

1878, p. 466, § 8, p. 481, validating and curing certain defective acknowledgments held to cure all defects as to the attestation of the instrument, including the lack of witnesses, where an attempt to convey was otherwise sufficient, and the intent to pass title was unquestioned. *Carson v. Thompson*, 10 Wash. St. 295 (38 Pac. Rep. 1116). Pa. Act, May 12, 1891, P. L. p. 53, construed and applied. *New York & O. Land Co. v. Weidner*, 169 Pa. 359 (32 Atl. Rep. 557).

Sec. 24. Miscellaneous notes. A deed without acknowledgement is binding on the parties thereto and all others having notice. *Krueger v. Walker*, Ia. (68 N. W. Rep. 320); *Rullman v. Barr*, 54 Kan. 643 (39 Pac. Rep. 179). Under R. I. Pub. Stat. ch. 173, §§ 6, 7, one who has signed, sealed and delivered a deed may be compelled, under arrest and imprisonment, to acknowledge the same. *Sullivan v. Chambers*, 18 R. I. 799 (31 Atl. Rep. 167). Pa. Act, May 25, 1878, applied—reformation of defective certificate. *Spencer v. Reese*, Pa. St. (30 Atl. Rep. 722).

ADVERSE POSSESSION.

EPITOME OF CASES.

Sec. 25. As to what constitutes adverse possession. Actual occupancy is essential to a claim of adverse possession. *Williamette Real Estate Co. v. Hendrix*, 28 Ore. 485 (42 Pac. Rep. 514). Occasional acts of ownership are not sufficient. *Shaffer v. Gaynor*, 117 N. C. 15 (28 S. E. Rep. 154); *Hamilton v. Icard*, 117 N. C. 476 (28 S. E. Rep. 354); *Bonham v. Loeb*, 107 Ala. 604 (18 So. Rep. 300); *Strange v. Spalding*, Ky. (29 S. W. Rep. 137); *Sequatchie Val. Coal & Iron Co. v. Coppinger*, 95 Tenn. 526 (32 S. W. Rep. 465); *Elyton Land Co. v. Denny*, Ala. (18 So. Rep. 561). A possession held by mistake may be adverse. *Woodward v. Faris*, 109 Cal. 12 (41 Pac. Rep. 781). But an occupancy up to a mistaken boundary line with no intention to

claim beyond the true line is not adverse. *Davis v. Caldwell*, 107 Ala. 526 (18 So. Rep. 103). Where the occupancy of land up to a boundary line is by agreement, the possession does not become adverse. *Peters v. Gracia*, 110 Cal. 89 (42 Pac. Rep. 455). Payment of taxes, cutting of timber, and permitting one's cattle to graze upon outlying, unfenced lands, does not constitute that open, notorious, visible possession of land which will deprive the true owner of his title. *Nye v. Alfter*, 127 Mo. 529 (30 S. W. Rep. 186). In order to create an adverse possession the holding need not be in good faith nor in the honest belief of right. *Lattie-Morrison v. Holladay*, 27 Ore. 175 (39 Pac. Rep. 1100). Occupancy of land by permission and subservient to the true owner will not establish a title by adverse possession. *Johnson v. Butt*, 46 Neb. 220 (64 N. W. Rep. 691). As to what will constitute an adverse use of water rights, see *Mason v. Horton*, 67 Vt. 266 (31 Atl. Rep. 291; 48 Am. St. Rep. 817). The occupancy and exclusive enjoyment of land under a deed from one co-tenant to the entire land is not adverse to the other co-tenant when their interest in the land is recognized by the party in possession. *Price v. Hall*, 140 Ind. 314 (39 N. E. Rep. 941).

Where a statute requires the possession to be "actual" what acts may or may not constitute such possession are necessarily varied and depend upon the nature, locality and use to which the property may be applied, the situation of the property and other circumstances. Actual occupancy of the entire tract is not necessarily essential, but there must be such an appropriation of the land to the individual as will apprise the community in its vicinity that the land is in the exclusive use and enjoyment of such person. Actual residence upon the land is not indispensable. *Johns v. McKibben*, 156 Ill. 71 (40 N. E. Rep. 449). "Adverse possession is the act of holding possession, and claiming the right to do so, against one having a superior right or title. Two things, it is said, must occur: 'First an ouster of the real owner, followed by an actual possession by the adverse claimant; and, second, an intention on the part of the latter to oust the owner, and possess for himself.'" *Ivy v. Yancey*, 129 Mo. 501 (31 S. W. Rep. 937). Citing, Sedg. & W. Tr. Tit. Land, § 729; *Davis v. Bowmar*, 55 Miss. 765. The possession of a grantor in a

trust deed is not adverse to the trustee or one who purchases at a sale under the trust deed until there has been a repudiation of the deed. *Ivy v. Yancey*, 129 Mo. 501 (81 S. W. Rep. 937). The possession of a trustee can not be adverse until there has been a clear, unequivocal, and notorious disclaimer and disavowal of the trust. *Meacham v. Bunting*, 156 Ill. 586 (41 N. E. Rep. 175).

In discussing what constitutes adverse possession, in the recent case of *Lenning's Ex'rs v. White*, Va. (20 S. E. Rep. 831), the supreme court of Virginia say: "In *Taylor v. Burnside*, 1 Grat. 165, Judge Baldwin, at page 192, clearly defines adversary possession and the essential elements thereof. He says: 'An adversary possession must also be actual, in reference to the means by which it is acquired. In that sense, I understand an actual possession to be the occupation, use or enjoyment of the subject-matter of controversy, by residence, cultivation, improvement, or other open, notorious and habitual acts of ownership. Of occupation, use or enjoyment, residence, cultivation and improvement, respectively, while they continue, are usually the most obvious and decisive. But there may be other open, notorious and habitual acts of ownership, of quite equivalent import and effect. Take, for example, the case of a town resident who, claiming title to a lot or tract of woodland in the vicinity, openly, notoriously and habitually cuts and hauls from it his necessary supplies of fuel, or in like manner makes it a source of revenue, by sales of firewood or timber; or the case of an uninclosed or unimproved lot in or near a city, devoted by the professed owner to his use or profit as a coal or lumber yard, quarry or landing place. There cannot be stronger instances of actual possession than these, and other like cases which might be stated; but they can serve only for the purpose of illustration. When we leave the unquestionable tests of residence, cultivation and improvement, every case must depend in a great measure upon its own circumstances, and requires a recurrence to the general principle, above stated, of open, notorious and habitual acts of ownership. That principle must, moreover, be guarded in its application by taking care not to confound an adverse claim with an actual possession, and by distinguishing between repeated trespasses, under a

pretense or even belief of title, and the dominion, control and enjoyment of actual or apparent ownership. That an adversary possession requires actual occupancy, or what is equivalent to it, is sustained by an overwhelming current of American decisions.'” As to what constitutes adverse possession as illustrated by cases depending upon particular facts, see *St. Louis, A. & T. H. R. Co. v. Nugent*, 152 Ill. 119 (39 N. E. Rep. 263); *Brown v. Kohout*, 61 Minn. 113 (63 N. W. Rep. 248); *Butler v. Drake*, 62 Minn. 229 (64 N. W. Rep. 559); *Feliz v. Feliz*, 105 Cal. 1 (38 Pac. Rep. 521); *McAuliff v. Parker*, 10 Wash. St. 141 (38 Pac. Rep. 744); *Hasson v. Klee*, 168 Pa. St. 510 (82 Atl. Rep. 46); *Jensen v. Hunter*, Cal. (41 Pac. Rep. 14); *Flint v. Long*, 12 Wash. St. 342 (41 Pac. Rep. 49); *Wiggins v. Kirby*, 106 Ala. 262 (17 So. Rep. 354); *Ivy v. Beddingfield*, 107 Ala. 616 (18 So. Rep. 139); *Sample v. Reeder*, 107 Ala. 227 (18 So. Rep. 214); *Garrett v. Belmont Land Co.*, 94 Tenn. 459 (29 S. W. Rep. 726); *Cooper v. Great Falls Cotton Mills Co.*, 94 Tenn. 588 (30 S. W. Rep. 353); *Hibbard v. Wilson*, Ky. (32 S. W. Rep. 1086).

Sec. 26. Proof of adverse possession — Burden — Presumptions. Adverse title is not sufficiently shown by proving the existence of a general understanding in the community that the property in dispute belonged to the person claiming it by such title. *McInerney v. Beck*, 10 Wash. St. 515 (39 Pac. Rep. 180). Upon the issue of adverse possession it is competent for the claimant to prove that during his possession the land was reputed to be his, as tending to prove that the legal owner was aware of such possession and claim of right. *McAuliff v. Parker*, 10 Wash. St. 141 (38 Pac. Rep. 744). The burden is on the party asserting the adverse possession. *Kurz v. Miller*, 89 Wis. 426 (62 N. W. Rep. 182). The court say: “One in the possession of land to which he has no claim of title is presumed to be in possession in amity with and in subservience to the legal title. Evidence of adverse possession is always to be construed strictly, and every presumption is to be made in favor of the true owner. The burden of establishing it is on him who asserts it, and it is not to be made out by inference or presumption, but by clear and

positive proof. *Sydnor v. Palmer*, 29 Wis. 252; *Wilson v. Henry*, 35 Wis. 245; *Hacker v. Horlemus*, 74 Wis. 21 (41 N. W. Rep. 965); *Dhein v. Beuscher*, 83 Wis. 825 (53 N. W. Rep. 551); *Ayers v. Reidel*, 84 Wis. 283 (54 N. W. Rep. 588); *Graeven v. Dieves*, 68 Wis. 317 (31 N. W. Rep. 914). What constitutes adverse possession is a question of law for the court, and whether the necessary facts exist to establish it is a question of fact for the jury. In order to constitute adverse possession against the title of the true owner, the adverse claim must be sufficiently open and obvious, both as to the fact of possession and its really adverse character, to apprise the true owner, if in charge of the property and in the exercise of reasonable diligence, of the fact and of an intention to usurp possession of that which in law is his own. Secret or disconnected acts, of an equivocal character, occurring at long intervals, will not suffice. The possession must be actual, open, continuous, and under claim of right as against the true owner." Where no other title is set up against the legal title to land than that of adverse occupancy, the burden of proof of all the essential facts requisite to give title by adverse possession is upon him who asserts such prescriptive title. Such proof, to be effectual, must show a continuous, unbroken, open, notorious, actual, and adverse possession, under a claim of right, for the full statutory period; and the limits, location, and extent of his occupancy must be definitely and clearly established by affirmative proof, and cannot be established or extended by presumption. *Wilkins v. Pensacola City Co.*, 36 Fla. 36 (18 So. Rep. 20). One who claims by adverse possession a portion of a Mexican grant, must affirmatively show a perfect grant prior to the issuance of his patent. *Tuffree v. Polhemus*, 108 Cal. 670 (41 Pac. Rep. 806). The presumption that the title claimed under a deed has been extinguished, which arises from a failure to make entry thereunder for more than twenty years, does not exist in favor of persons who have themselves never exercised ownership. *Roll v. Rea*, 57 N. J. L. 647 (32 Atl. Rep. 214). Adverse possession cannot be made out by inference, but must be established by clear and positive proof. Where one is in the possession of land under a deed and occupies adjacent land enclosed therewith, the presumption of law is not that he entered into possession under

his deed claiming only the title and possession which his grantor's deed gave him; and that his possession was restricted to the premises granted. *Fuller v. Worth*, 91 Wis. 406 (64 N. W. Rep. 995).

Sec. 27. Extent of possession. A party who enters into the possession of land under a conveyance is presumed to enter under the description therein and his occupancy of a part claiming the whole is construed as a possession of the entire tract not in the adverse possession of another. Where a person relies upon naked possession as the foundation for an adverse claim there must be an actual occupancy and his possession must be visible, continuous, notorious, distinct and hostile. Both parties cannot be seized at the same time of the same land under different titles. The law, therefore, adjudges the seizure of all that is not in the actual occupancy of the adverse party to him who has the better title. Where a party in possession has no paper title his possession must be continuous, and if the occupation is by means of a structure upon the land which is removed or taken away and re-erected on a different part of the land before the statute of limitations has run its full time, it follows from the change in the possession that that part of the land where the old structure stood was not in the actual possession of the possessor for the requisite time, and hence as to it there is no bar. *Peoria & P. U. Ry. v. Tamplin*, 156 Ill. 285 (40 N. E. Rep. 960). Where the owner of the true legal title to a tract of land is in actual possession of a part of said tract, and other persons claiming adversely are in possession of other parts thereof, the law is well settled that in such cases of mixed possession the possession of all parts of the tract not shown to be actually and adversely occupied will be presumed to be with the owner of the true title in possession of a part of the tract. The real title draws to the actual occupant who holds it a constructive possession of all the land covered by it that is not actually and adversely occupied, and the adverse occupant, not having any title, is to be confined to the actual limits of his occupancy. *Wilkins v. Pensacola City Co.*, 36 Fla. 86 (18 So. Rep. 20).

When a person having colorable title enters upon vacant land claiming title to the whole tract covered by his title

papers, his possession is co-extensive with his boundaries, and this is true although the title conveyed by the writing under which he claims is worthless; but an entry upon and possession of land within an older grant not embraced within a younger grant does not have the effect of an entry upon and possession of land where a junior patentee had prior to that time entered upon and was then actually occupying part of such land by building, clearing, cultivating, or enclosing and claiming title to the whole. *Stull v. Rich Patch Iron Co.*, 92. Va. 253 (28 S. E. Rep. 293). The adverse possession of one distinct piece of land will not draw to it the constructive possession of another vacant and distinct piece owned by another person, although the adverse occupant holds a paper title by an instrument wherein the described boundaries are coextensive with both pieces of land. *McRoberts v. McArthur*, 62 Minn. 810 (64 N. W. Rep. 903). The Rev. Stat. of Maine, ch. 105, § 10, is as follows: "To constitute a disseizin, or such exclusive and adverse possession of lands as to bar or limit the right of the true owner thereof to recover them, such lands need not be surrounded with fences or rendered inaccessible by water; but it is sufficient, if the possession, occupation and improvement are open, notorious, and comporting with the ordinary management of a farm; although that part of the same, which composes the woodland belonging to such farm and used therewith as a woodlot, is not so inclosed." Construing and applying this statute it is held that it was not intended to apply to a case where a person enters upon land of which he holds title and all his visible acts of ownership are done upon that land, and thereby acquires title to a tract of woodland although it may lie contiguous to such land. In order for the statute to apply the woodland must be a part of the farm adversely occupied. *Adams v. Clapp*, 87 Me. 816 (32 Atl. Rep. 911).

Sec. 28. Holding under the title of another. Where the vendee, by the payment of the entire purchase money and the taking of possession acquires an equitable title from his vendor who retains the legal title for future conveyance, such vendee does not hold adversely to his vendor. He holds

in subordination to, and under the protection of, the title of his vendor, and no length of time is sufficient for such possession to ripen silently into a title by adverse possession. *Chapman v. Chapman*, 91 Va. 397 (21 S. E. Rep. 818; 50 Am. St. Rep. 846). The court say: "Such possession is in privity with and in subserviency to the legal title of his vendor, and he is not allowed to impeach or assail it. As was said by President Tucker in *Williams v. Snidow*: 'Adverse possession is not the mere holding over against the will of the party from whom you obtain the possession. It is the holding by claim of title, adverse to another's title, that constitutes adverse possession.' *Williams v. Snidow*, 4 Leigh 14, 20. Before adverse possession can arise between a vendor and his vendee, or between the grantee of the vendor and such vendee, where the vendor has retained the title, and the statute of limitations commenced to run, the vendee must have dissevered the privity of title between them by the assertion of an adverse right, and openly and continuously disclaimed the title of his vendor, and such disclaimer be clearly brought home to the knowledge of the vendor or his grantee." *Citing, Creekmur v. Creekmur*, 75 Va. 430, 436; *Whitlock v. Johnson*, 87 Va. 323, 327 (12 S. E. Rep. 614).

Sec. 29. Color of title. Entry as heir of one who held the patent to the land, although the patent is not in possession of the claimant, is an entry with color of title. *Miller v. Davis*, Mich. (64 N. W. Rep. 888). Under Wisconsin Rev. Stat., §§ 8096, 8098, allowing recovery for improvements, it is held that one who holds under a deed which is afterwards set aside on the ground there was no delivery, holds adversely by color of title. *Stewart v. Stewart*, 90 Wis. 516 (63 N. W. Rep. 886; 48 Am. St. Rep. 949). A tax deed valid on its face constitutes color of title, though it may be defective in form or substance, or be founded on irregular proceedings. *Lennig's Ex'rs v. White*, Va. (20 S. E. Rep. 831). An improper tax deed may constitute color of title. *Collins v. Boring*, 96 Ga. 360 (23 S. E. Rep. 401). See Ballards' Annual, Vol. 2, § 24 and Vol. 3, § 30.

Sec. 30. Payment of taxes. Where the payment of taxes is an aid to an adverse possession it will inure to the

benefit of him who first makes the payment. *Osburn v. Searles*, 156 Ill. 88 (40 N. E. Rep. 452) ; *Johns v. McKibben*, 156 Ill. 71 (40 N. E. Rep. 449). The rule that the payment of taxes is a necessary element of adverse possession does not apply when the property is exempt from taxation. *United States v. Schwalby*, 87 Tex. 604 (30 S. W. Rep. 435). The payment of taxes by one to whom they are assessed upon land is not sufficient to constitute adverse possession. *Miller v. Davis*, Mich. (64 N. W. Rep. 838). Cal. Code Civ. Proc., § 825, as amended in 1878, provides that in order to establish adverse possession it must be shown that the land has been occupied and claimed for a period of five years continuously and that the party has paid all the taxes which have been assessed on such land. Under this statute it is held that a defendant in ejectment who relies on the statute of limitations makes a complete defense if he shows a continued adverse possession for five years, and a payment of all taxes after 1878, although not the five years next preceding the commencement of the action; and, when the fee is once acquired by a five years' adverse possession, it continues until conveyed by the possessor, or until lost by another adverse possession of five years. *Southern Pac. R. Co. v. Whitaker*, 109 Cal. 268 (41 Pac. Rep. 1088).

Sec. 31. Tacking. The successive possessions of several distinct occupants of lands, between whom no privity exists, cannot be united to make up the requisite period. While it is not necessary, in order to create such privity as will enable a subsequent occupant to tack his possession to that of a prior occupant, that there should be a conveyance in writing, and although such prior possession may be transferred by parol, yet it must clearly appear that the particular premises, were in fact embraced in the deed or transfer, in whatever form it may have been made. No presumption can be indulged in on this subject. *Allis v. Field*, 89 Wis. 327 (62 N. W. Rep. 85). The adverse possession of successive occupants, between whom a privity of estate exists, can be tacked so as to make a continuous twenty-year adverse possession. Where one incloses and possesses more land than is covered by the description in his deed, and sells to another by the same

description, who enters in possession of all the land inclosed, the successive possessions can be tacked. *Davock v. Nealson*, N. J. L. (32 Atl. Rep. 675). In order for a son, by virtue of the provisions of § 2664 of the Georgia Code, to acquire title to land belonging to his father, the former must have exclusive possession, under all the conditions therein specified, for the full period of seven years; and if, before the expiration of that period, a son, while in possession, undertook by deed to convey the land to his wife and children, although he may, after the execution of the deed, have remained upon the land with the grantees, his possession was no longer exclusive and in his own right, but in subordination to theirs. In such case the grantees could not tack their possession under the deed to that which had been previously held by the grantor, and thus acquire title in themselves as against the grantor's father or his successors in title. *Burch v. Burch*, 96 Ga. 133 (22 S. E. Rep. 718).

Sec. 32. Rights of the public. A claim of adverse possession does not run against the government to defeat its title no matter how distinct and hostile the possession may be. *Wagnon v. Fairbanks*, 105 Ala. 527 (17 So. Rep. 20); *Wiggins v. Kirby*, 106 Ala. 262 (17 So. Rep. 354). As against the public the abutting land owner cannot acquire any right by adverse possession of a portion of a highway no matter how long continued. *Heddleston v. Hendricks*, 52 O. St. 460 (40 N. E. Rep. 408); *Depriest v. Jones*, Va. (21 S. E. Rep. 478). As to how public rights are affected by adverse possession, see *Ballards' Annual*, Vol. 2, § 36, and Vol. 3, § 42. Where a farmer fences in a strip of land adjoining a railroad track and uses it continuously for agricultural purposes for twenty years, it will constitute a bar to the assertion by the railroad company of an easement in such strip. *Illinois Cent. R. Co. v. O'Connor*, 154 Ill. 550 (39 N. E. Rep. 563).

Sec. 33. Landlord and tenant—Trustee and cestui que trust. A tenant, after the expiration of his lease, may disavow and disclaim his tenancy and the title of his landlord, and drive the landlord to his action for the recovery of possession within the period of the statute of limitation; but before

any foundation can be claimed for the operation of the statute in such a case, a clear, positive, and continuous disclaimer and disavowal of the landlord's title, and an assertion of an adverse right, must be brought home to the landlord by clear, positive, and distinct notice. *Wilkins v. Pensacola City Co.*, 86 Fla. 86 (18 So. Rep. 20). The possession of one *cestui que trust* will be regarded in law as the possession of a *co-cestui que trust*, as well as that of the trustee, in the absence of any manifest hostility on the part of the occupying *cestui que trust* brought to the knowledge of the trustee and *co-cestui que trust*. A tenant cannot dispute or gainsay the title of his landlord so long as it remains as it was at the time the tenancy commenced, and no fraud has been practiced in securing it; yet it may be shown that the title under which the tenant has entered has expired, or has been extinguished by operation of law. While the attornment of a tenant to a stranger may not alone operate as a disseisin of a landlord, yet, if possession be assumed by other acts besides the attornment, and the landlord has full knowledge of such change in the tenancy, and of the possession in connection therewith, the latter may become adverse as to him. *Winn v. Strickland*, 84 Fla. 610 (16 So. Rep. 606).

Sec. 34. Co-tenants—Remaindermen. In order for the possession of one co-tenant to be adverse to the other co-tenants it must be held in denial of their title. *Milbourn v. David*, 7 Houst. (Del.) 209 (80 Atl. Rep. 971). In a recent case it is said "As between coparceners and others claiming in privity, the entry and possession of one is always presumed to be in the maintenance of the right of all; and this presumption will prevail in favor of all until some notorious act of ouster or adversary possession is brought home to the knowledge of others; or it be clearly shown that he has become the owner by purchase. A clear, positive, and continued disclaimer of title, and the assertion of an adverse right, brought home to the knowledge of the other coparceners, are indispensable, although great lapse of time, with other circumstances, may warrant the presumption of a disseisin or ouster by one coparcener or other joint owner." *Pillow v. Southwest Va. Imp. Co.*, 92 Va. 144 (28 S. E. Rep. 82). Citing, *Stonestreet*

v. *Doyle*, 75 Va. 356; Freem. Coten. § 166. This doctrine is supported by *Hulvey v. Hulvey*, 92 Va. 182 (23 S. E. Rep. 233). It is held that one claiming title in fee under the grantee of a life tenant may acquire title by adverse possession against the remaindermen, although such claimant was himself a remainderman. *Mole v. Folk*, S. C. (22 S. E. Rep. 882). The court say: "When a life estate precedes the falling in of a contingent remainder, no act of the life tenant can divest the estate of the contingent remaindermen. The latter are not obliged to act until the life estate determines. *Moséley v. Hankinson*, 22 S. C. 323. But the life estate determines at the moment there is an owner to land who has the right to sue touching the same. Granted that, if one of a set of contingent remaindermen is in possession of said land, such possession of one is the possession of all. However, if there should be an ouster by that one in possession, who should hold the land ten years after such ouster, the statute is a bar."

Sec. 35. Breaking the continuity of adverse possession. The Oregon statute, Hill's Ann. Laws, §§ 316, 318 and 329, provides as follows: "Any person who has a legal estate in real property, and a present right to the possession thereof, may recover such possession, with damages for withholding the same, by an action at law." "The plaintiff in his complaint shall set forth the nature of his estate in the property, whether it be in fee, for life, or for a term of years, and for whose life, or the duration of such term, and that he is entitled to the possession thereof, and that the defendant wrongfully withholds the same from him to his damage in such sum as may be therein claimed." "In an action to recover the possession of real property, the judgment therein shall be conclusive of the estate in such property and the right to the possession thereof, so far as the same is thereby determined, upon the party against whom the same is given, and against all persons claiming from, through or under such party, after the commencement of such action." Under these statutory provisions it is held that where an action for the possession of land is commenced against one in possession before the completion of the statutory period necessary to give title, and in which action a judgment is subsequently returned

but not enforced by a writ of possession until after the expiration of the statutory period, such action for possession stops the running of the statute of limitations from the date of the commencement of the action. *Barrell v. Title Guar. & T. Co.*, 27 Ore. 77 (89 Pac. Rep. 992). The court say: "The continuity of adverse possession may be broken in several ways. It may be done by an entry of the legal owner, by an abandonment of the possession, by recognition of the owner's title, or an acknowledgment, made before the statute has run, by the person in possession, that he has and claims no title to the lands occupied. And such recognition or acknowledgment, to be effectual, need not be in express terms, but may be inferred from a variety of circumstances, as by taking a lease from the owner, offering to hold the land under him, offering to purchase or to surrender it, or asserting that he gave him the use of the land for a term or for life, or in any way which admits the superiority of the owner's title, and that the occupant holds under or in subservience to him. 2 Wood Lim., §270. Any of these conditions would create an estoppel *in pais*, as against the party in possession, to claim that his prior holding was adverse. Now, here we have the solemn judgment of a court of competent jurisdiction, which, as we have seen, is conclusive of the estate and right of possession of the premises in dispute, and creates an estoppel, as against the defendant, to deny the title of plaintiff, or his right to the possession thereof at the date of the judgment in ejectment. As to all other intents and purposes, the estoppel here created is just as effective as the estoppel *in pais*, and we are unable to see why, upon principle, it should not be just as effective in breaking the continuity of the running of the statute of limitations. If a voluntary recognition of a superior title will stop the running of the statute, why not the adjudication of a court of competent jurisdiction, where the title is the identical thing in dispute, as well as the right of possession?" This doctrine is supported by *Riverside L. & R. Irr. Co. v. Jensen*, 108 Cal. 146 (41 Pac. Rep. 40). Where the possession is not disturbed, the rendition of a judgment which is subsequently set aside does not break the continuity of an adverse possession so as to disturb rights obtained thereby. *Casey v. Anderson*, 17 Mont. 167 (42 Pac. Rep. 761). It is held otherwise where

the judgment remains in force. *Snell v. Harrison*, 131 Mo. 495 (32 S. W. Rep. 37). Possession of a corporeal hereditament, to be effectual, need not be continually visible or without cessation actively asserted. If a man has once received rightful and actual possession of land, he may go to any distance from it without authorizing any servant or agent or other person to enter upon it or look after it, may leave it for years uncultivated and unused, may set no mark of ownership upon it, and his possession may nevertheless still continue; at least, unless his conduct afford evidence of intentional abandonment. *Chapman v. Chapman*, 91 Va. 397 (21 S. E. Rep. 818; 50 Am. Stat. Rep. 846).

Sec. 36. Title by adverse possession. Possession of land for twenty years under a claim of ownership confers title. *Sullivan v. Eddy*, 154 Ill. 199 (40 N. E. Rep. 482). In Iowa it is held that actual adverse possession of real estate for ten years under a claim of absolute ownership creates a title by prescription, not merely for defensive, but for all practical purposes upon which an action to quiet title may be maintained. *Independent Dist. of Oak Dale v. Fagen*, Ia.

(63 N. W. Rep. 456). Where possession alone is relied upon to give title, the recovery will be limited to the quantity of land which is shown to have been actually in possession of the claimant. *Tripp v. Fausett*, 94 Ga. 330 (21 S. E. Rep. 572). Possession of land under a color of title, however long continued, will not ripen into a prescriptive title, nor serve for tacking to make out the full term of prescription, if, instead of being attended with a claim of right, such right be expressly disclaimed pending the possession. *Wade v. Johnson*, 94 Ga. 348 (21 S. E. Rep. 569). Where title to land has been fully acquired by adverse possession, a parol agreement by the one in possession to the effect that he will have a survey to determine the true line, until executed, does not divest him of the title he has acquired. *Lamoreaux v. Creveling*, 103 Mich. 501 (61 N. W. Rep. 783). When the legal title to land is granted by act of congress, the title of the government is as effectively divested as it would be by the issuance of a patent therefor by the executive department, under authority of law; and such land then becomes subject to the limitation laws of the

state in which it is situated; and an adverse possession thereof after the date of such grant for the requisite period fixed by such laws will ripen into a legal title in favor of the adverse possessor, and the effect of such possession is not interrupted or defeated by the subsequent issuance of a patent therefor, in pursuance of such act of congress. *Southern Pac. R. Co. v. Whitaker*, 109 Cal. 268 (41 Pac. Rep. 1088). For cases which depend upon particular facts and illustrate an acquisition of title by adverse possession, see, *Manistee Mfg. Co. v. Cogswell*, 103 Mich. 602 (61 N. W. Rep. 884); *Crocker v. Collins*, S. C. (22 S. E. Rep. 885); *Bon Air Coal, L. & Lum. Co. v. Parks*, 94 Tenn. 268 (29 S. W. Rep. 180).

Sec. 37. Title by adverse possession—Statute of limitations as a weapon of offense. After title is acquired by adverse possession, the holder thereof, if from choice, or by force or fraud, he loses the actual possession, may recover the same by suit in the same manner as if he had perfect paper title. Having once acquired the title, he can only be divested of it by due process of law. *Sutton v. Pollard*, 96 Ky. 640 (29 S. W. Rep. 637). He may sue for trespass. *Bushby v. Florida Cent. & P. R. Co.*, S. C. (28 S. E. Rep. 50). The court say: "It is not to be denied that at one time it seemed to be supposed that adverse possession operated simply as a bar to an action to recover possession of the land. Accordingly, we find in the books the expression that the statute of limitations may be used as a shield of defense, not as a weapon of offense. But, on the other hand, we find in our own cases, which will be hereinafter referred to, dicta at least which plainly recognize the doctrine that adverse possession of real estate for the requisite period does confer positive title, which may be asserted affirmatively. As is said by Mr. Justice Miller in *Campbell v. Holt*, 115 U. S., at pages 622, 628, (6 Sup. Ct. Rep. 209): 'By the long and undisturbed possession of tangible property, real or personal, one may acquire a title to it or ownership superior in law to that of another who may be able to prove an antecedent, and at one time paramount, title. * * * Mr. Angell, in his work on Limitations of Actions, says that the word "limitation" is used in reference to the time which is prescribed by the

authority of the law during which a title may be acquired to property by virtue of a simple adverse possession and enjoyment, or the time at the end of which no action at law or suit in equity can be maintained. "Prescription, therefore," he says, "is of two kinds; that is, it is either an instrument for the acquisition of property, or an instrument of an exemption only from the servitude of judicial process." * * *

The English and American statutes of limitations have in many cases the same effect, and, if there is any conflict of decisions on the subject, the weight of authority is in favor of the proposition that where one has had the peaceable, undisturbed open possession of real or personal property, with an assertion of his ownership, for the period which under the law would bar an action for its recovery by the real owner, the former has acquired a good title—a title superior to that of the latter, whose neglect to avail himself of his legal rights has lost him his title. This doctrine has been repeatedly asserted in this court. [Citing the cases.] It is the doctrine of the English courts, and has often been asserted in the highest courts of the states of the Union.' This doctrine is expressly recognized in *Cantey v. Platt*, 2 McCord, 260, in which Judge Huger, in delivering the opinion of the court, says: 'To enable a plaintiff to succeed in his statutory claims to land, he must prove that he had possession of the land the full time required by the statute law'—going on to say that such possession must be adverse, and the extent of it shown. That case is cited with approval by O'Neill, J., in *King v. Smith*, Rice, at page 14, where the same language is quoted. The same doctrine is recognized in *McLoed v. Rogers*, 2 Rich. Law, at page 23; *Turpin v. Brannon*, 3 McCord, at page 267." Cal. Civ. Code, § 1007, provides that occupancy is sufficient to bar an action to recover property and "confers a title thereto denominated a title by prescription which is sufficient against all." Under this statute it is held that where a party has lost title to land by the adverse possession of another and the possession has been transferred to a third person, the original holder of the legal title cannot have his title quieted as against such third person, although the holding of the latter is not connected in title with the party who acquires title by adverse

possession. *Woodward v. Faris*, 109 Cal. 12 (41 Pac. Rep. 781).

Sec. 38. Sale of land in the adverse possession of another. A deed or other instrument purporting to convey land, which shows upon its face that the grantors therein were out of possession of the land granted at the time of its execution and that such land at the time was adversely held by another, is void on its face as to such adverse occupant. *Reyes v. Middleton*, 36 Fla. 99 (17 So. Rep. 937; 51 Am. St. Rep. 17; 29 L. R. A. 66). The statute of Kentucky which declares a deed of land adversely held by another champertous and void applies to a sheriff's deed under an execution sale where the land was held adversely by one other than the judgment debtor. *Sneed v. Hope*, Ky. (80 S. W. Rep. 20). Under S. Dak. Comp. Laws, § 8303, "every grant of real property * * * is void, if at the time of the delivery thereof, such real property is in the actual possession of a person claiming under a title adverse to that of the grantor." *Fitzgerald v. Miller*, S. Dak. (53 N. W. Rep. 221). See Ballards' Annual Vol. 2, § 85, and Vol. 3, § 48.

Sec. 39. Construction of statutes. Under Sand. & H. Ark. Dig., § 4819, which provides that no action for the recovery of land against any person who may hold the same under a donation deed from the state shall be maintained, unless the plaintiff, his ancestor or grantor, was seized of the lands within two years next before the commencement of the action, it is held that adverse possession for two years under a donation deed valid on its face, forever bars the real owner. *Finley v. Hogan*, 60 Ark. 499 (39 S. W. Rep. 1045). Miss. Code, 1892, § 4148, provides that "adverse possession for a period of twenty-five years, under a claim of right or title shall be *prima facie* evidence in such case, that the law, authorizing the disposition of the lands, had been complied with, and the lease or sale duly made. If the claim be under a lease, the time at which the lease expires shall be fixed by the court." It is held that this statute applies to a person in possession under an assignment of a lease and not merely to cases where a lease has been executed by the proper authorities, the validity of which is attacked. *Carroll Co. v. Estes*, 72 Miss. 171 (16

So. Rep. 908). Under Mill. & V. Tenn. Code, § 3459, one holding adverse possession of land for seven years under an "assurance of title purporting to convey an estate in fee," becomes vested with a good title. *East Tenn. Iron & Coal Co. v. Broyles' Heirs*, 95 Tenn. 612 (32 S. W. Rep. 761).

ALIENS.

EPITOME OF CASES.

Sec. 40. Heirs of aliens — Construction of statute. The Iowa statute, ch. 85, of the acts of the 22d Gen. Assem., § 1, provides that "nonresident aliens are hereby prohibited from acquiring title to or taking or holding any lands or real estate in this state by descent, devise, purchase or otherwise only as hereinafter provided, except that the widow and heirs of aliens who have heretofore acquired lands in this state under the laws thereof may hold such lands by devise or descent for a period of ten years and no longer, and if at the end of such time herein limited such lands so acquired have not been sold to a *bona fide* purchaser for value or such alien heirs have not become residents of this state, such lands shall escheat and revert to the state of Iowa. * * *" *Easton v. Huott*, Ia. (64 N. W. Rep. 408; 31 L. R. A. 177). Construing and applying this statute the supreme court of Iowa say: "The appellants contend that this act does not apply to resident aliens, and that the determination of this case is governed by the law as announced in *King v. Ware*, 53 Ia. 97 (4 N. W. Rep. 858). Some stress is also placed upon section 22 of article 1 of the constitution of this state. That provides that 'foreigners who are or who may hereafter become residents of this state shall enjoy the same rights in respect to the possession, enjoyment and descent of property as native born citizens.' We do not think that provision has any application to the controversy in this case. It applies only to foreigners who were at the time of its adoption, or who thereafter become, residents of this state. It is conceded by the parties to this

action that the decedent acquired a perfect title to the land in question, and the controversy is solely over the right of non-resident aliens to inherit land situated in this state. In the case of *King v. Ware, supra*, the rule was recognized that in the absence of license, by statute or otherwise, an alien cannot acquire or hold realty, and it was held that the nonresident alien children of a deceased alien, who was also a nonresident, could not inherit an interest in land in this state of which he died seised. But that decision was based upon §§ 2488-2498 of the revision of 1860, which have been held in several cases not to confer upon alien nonresidents of the United States the capacity to inherit real estate. The claim of the appellants that chapter 85 of the acts of the 22d General Assembly does not apply to resident aliens cannot be sustained to the extent claimed. It is true it refers to the right of nonresident aliens to acquire and hold real estate, but the clause, 'except that the widow and heirs of aliens who have heretofore acquired lands in this state under the laws thereof may hold such lands by devise or descent for a period of ten years,' refers to widows and heirs of aliens, without restriction as to the place of residence of the widows, the heirs, or the aliens. It is not material to the acquirement of title under that provision whether the widow and heirs are aliens or are nonresidents, or whether the deceased alien was a resident. If an alien, whether living here or in a foreign country, die seised of land situated in this state, his widow and heirs, wherever they may reside, or whether aliens or not, may take title to the land by devise or descent. The words 'who have heretofore acquired land in this state' refer, not to the 'widows and heirs,' but to 'aliens.' The right is given to the widows and heirs of aliens to take title after the act took effect when the alien from whom they claim had acquired the title before the act took effect."

ASSIGNMENTS FOR CREDITORS.

EPITOME OF CASES.

Sec. 41. What constitutes—Execution. Where a debtor conveyed all his property in trust to be converted into money, which was to be divided equally among certain creditors and the surplus returned to the debtor, it was held to be an assignment under Cal. Civ. Code, § 3449. *Sabichi v. Chase*, 108 Cal. 81 (41 Pac. Rep. 29). A conveyance by an insolvent debtor to a trustee in the nature of a mortgage made to secure his creditors, which reserves the right to redeem upon payment of a specified sum, is not an assignment for creditors. *Wright v. Hutchinson*, 156 Ill. 575 (41 N. E. Rep. 172). A statutory provision (Fla. Acts. 1889, ch. 3891) requiring the deed to be verified by the assignor's affidavit is mandatory, and a failure to comply with it renders the assignment void. *Williams v. Crocker*, 36 Fla. 61 (18 So. Rep. 52). Citing, *Hill v. Alexander*, 16 Lea, 496; *Coggins v. Stephens*, 73 Ga. 414; *Mather v. McMillian*, 60 Wis. 546 (19 N. W. Rep. 440); *Jaffray v. McGehee*, 107 U. S. 861 (27 L. Ed. 495; 2 Sup. Ct. Rep. 367). Where the deed of assignment is placed on record by the assignor it will be presumed to be accepted by the creditors for whose benefit it is made, and the refusal of the assignor to accept the trust will not defeat it, but a court of equity may appoint a receiver in his place. *Ewing v. Walker*, 60 Ark. 503 (31 S. W. Rep. 45).

Sec. 42. Assignment by partners—Individual property. Where the statute (Fla. Acts, 1889, ch. 3891) requires the deed to embrace all the property of the assignor, an assignment by partners must include both their partnership and individual property. *Williams v. Crocker*, 36 Fla. 61 (18 So. Rep. 52). The court say: "Where a deed of assignment made by a firm of copartners for the benefit of their creditors conveys to the assignee nothing but the joint property of the

firm, without including also the property of the individuals composing the firm, the authorities are quite uniform that such assignments are partial assignments only, and void where the statute requires a conveyance of all the debtor's property. *Thomas v. Jenks*, 5 Rawle, 221; *Seaving v. Brinkerhoff*, 5 Johns. Ch. 329; *Sangston v. Gaither*, 8 Md. 40; *Insurance Co. v. Wallis*, 23 Md. 173; *Probst v. Weldon*, 46 Ark. 405; *Henderson v. Bliss*, 8 Ind. 100; *In re Allen*, 41 Minn. 430 (48 N. W. Rep. 382); *May v. Walker*, 35 Minn. 194 (28 N. W. Rep. 252); *Still v. Focke*, 66 Tex. 715 (2 S. W. Rep. 59); *Donoho v. Fish*, 58 Tex. 164; *Kennedy v. McKee*, 142 U. S. 606 (12 Sup. Ct. Rep. 803)."

Sec. 43. Setting aside. An assignment may be set aside because invalid on its face or on account of facts outside of the instrument, but not on account of what is done subsequent to its execution. *Allen v. Union & Planters' Bank*, 72 Miss. 549 (17 So. Rep. 442). The validity of a deed of assignment made for the benefit of creditors, and alleged to be fraudulent or void, may be tried in a court of law, upon an issue made between a creditor and the assignee summoned as garnishee, under the provisions of law relating to garnishments. *Williams v. Croacker*, 86 Fla. 61 (18 So. Rep. 52). Citing, *Lee v. Tabor*, 8 Mo. 822; *Moss v. Humphrey*, 4 G. Greene, 443; *Dawson v. Coffey*, 12 Ore. 513 (8 Pac. Rep. 838); *Bank v. Lanahan*, 60 Md. 477; *May v. Walker*, 35 Minn. 194 (28 N. W. Rep. 252); *Hardcastle v. Fisher*, 24 Mo. 70; *Bishop v. Hart*, 28 Vt. 71; *Keep v. Sanderson*, 2 Wis. 42 (60 Am. Dec. 404). In an action to set aside an assignment on account of a subsequent composition agreement entered into by part of the creditors, both the creditors signing and those not signing such agreement are necessary parties. *Allen v. Union & Planters' Bank*, 72 Miss. 549 (17 So. Rep. 442). Citing, *Stout v. Higbee*, 4 J. J. Marsh. 633; 2 Perry, Trusts, § 883; *Fell v. Brown*, 2 Brown, Ch. 218; *Mackellar v. Pillsbury*, 48 Minn. 399 (51 N. W. Rep. 222); *Willats v. Busby*, 5 Beav. 193.

Sec. 44. Discontinuing assignment proceedings. In construing Ill. Rev. Stat. 1893, ch. 10a, § 15, providing that assignment proceedings "may be discontinued upon the assent,

in writing, of such debtor, and the majority of his creditors in number and amount; and in such cases all parties shall be restored to the same rights and duties existing at the date of the assignment, except so far as such estate shall have already been administered and disposed of," it is held that a court will not order such discontinuance where the necessary assent has been procured by fraud, and the order would operate as a fraud on some of the creditors. *Howe v. Warren*, 154 Ill. 227 (40 N. E. Rep. 472). Where such proceedings are discontinued under this statute the unadministered assets must be treated as though no assignment had been made, each creditor standing upon the same footing of right to proceed against it as it existed when the assignment was executed. *Terhune v. Kean*, 155 Ill. 506 (40 N. E. Rep. 481).

Sec. 45. Miscellaneous notes. An assignee takes the property subject to existing valid liens and incumbrances, and where they exceed the value of the property he cannot, by suits, subject it to costs which would not necessarily have been incurred by the lien holders. *Kentucky Nat. Bank v. Louisville Bagging Co.* Ky. (88 S. W. Rep. 101). The title of one who purchases in good faith and for a valuable consideration from an assignee is not affected by his having constructive notice of the fact that the assignment was fraudulent and void upon its face as to creditors. 2 N. Y. Rev. Stat., p. 137, § 5, applied. *Wilson v. Marion*, 147 N. Y. 589 (42 N. E. Rep. 190). A conveyance by a bankrupt's assignee, purporting to convey only the bankrupt's interest, conveys subject to all equities which existed against him. *De Mey v. De Fer*, 103 Mich. 289 (61 N. W. Rep. 524).

Sec. 46. Miscellaneous notes—Construction of statutes. A statute (Cal. Civ. Code, § 3457) making an assignment void as against any creditor not assenting thereto in certain cases applies to a creditor whose demand is secured by mortgage and is not due at the time of the assignment. *Sabichi v. Chase*, 108 Cal. 81 (41 Pac. Rep. 29). Ill. Rev. Stat. 1898, ch. 10a, § 8, applied—citation and examination of assignor—jurisdiction of county court. *Holnbeck v. Wilson*. 159 Ill. 148 (42 N. E. Rep. 169). The provisions of Md. Code, Art. 47, § 23, relating to involuntary insolvency are

held not to apply to married women. *Clark v. Manko*, 80 Md. 78 (80 Atl. Rep. 621). Where a deed of assignment has been filed in the probate court in accordance with § 6885, O. Rev. Stat., and the assignee has qualified, that court is clothed with jurisdiction to fully execute the trust. And, where such deed conveys land incumbered by mortgage, the court has power, as an incident of jurisdiction, to order the land sold and the mortgage satisfied. Jurisdiction thus acquired is not ousted by the subsequent commencement of an action, in another court, to foreclose the mortgage. *Havens v. Horton*, 53 O. St. 842 (41 N. E. Rep. 258). Pa. Act, February 17, 1876, construed and applied—assignment for creditors—sale of property free from liens. *In re Handy's Estate*, 167 Pa. 552 (81 Atl. Rep. 988).

BONA FIDE PURCHASER.

EPITOME OF CASES.

Sec. 47. As to what constitutes a bona fide purchaser. Where a deed is made to a third party who pays the purchaser therefor, such grantee is a *bona fide* purchaser, although he may have no knowledge that the purchaser paid the grantor. His title will be superior to that of the grantee in an unrecorded prior deed of which he had no knowledge. *La Pice v. Key*, 88 Tex. 209 (80 S. W. Rep. 867). A *bona fide* purchaser, where his grantor is out of possession, will not be permitted, when it is shown that his grantor's title was obtained by the delivery of a deed without the knowledge and consent of the original grantor, who continued to remain in possession, and who was in no way estopped by his conduct to assert his title. *Allen v. Ayer*, 26 Ore. 589 (89 Pac. Rep. 1). A mortgagee is a purchaser to the extent of his interest in the mortgaged property, and where it appears that he is a *bona fide* purchaser for value and without notice of any secret unrecorded claim or interest in such property, he will be protected as such purchaser. *Warner v. Watson*, 85 Fla. 402 (17 So.

Rep. 654). An innocent purchaser of real estate for value is protected against outstanding equities and secret trusts. One who loans money to the holder of the legal title of real estate, and takes a mortgage upon such real estate to secure the same, is, to the extent of his claim, a purchaser of the land, and is entitled to the same protection from all secret equities of which he had no notice, at the time of taking the mortgage, as any other *bona fide* purchaser. *Doye v. Carey*, 3 Okla. 627 (41 Pac. Rep. 432). One who takes a mortgage to secure a pre-existing debt from one holding under a deed absolute on its face, which is in fact a mortgage, holds subject to the equities of the grantor in such deed. *Gibson v. Hutchins*, 43 S. C. 287 (21 S. E. Rep. 250). A purchaser without notice of an outstanding mortgage who has paid only a part of the consideration before acquiring notice is a *bona fide* purchaser only to the extent of the amount paid. *Davis v. Ward*, 109 Cal. 186 (41 Pac. Rep. 1010; 50 Am. St. Rep. 29). One who claims as assignee of a note and mortgage transferred after maturity is not a *bona fide* purchaser. *British & Amer. Mort. Co. v. Smith*, S. C. (22 S. E. Rep. 747). One who takes a mortgage to secure a pre-existing debt holds subject to prior equities. *Frick v. Taylor*, 94 Ga. 683 (21 S. E. Rep. 713). A mortgagee who takes his mortgage to secure a pre-existing debt, the consideration being an extension of time, is a *bona fide* purchaser. *De Mey v. De Fer*, 103 Mich. 239 (61 N. W. Rep. 524).

Sec. 48. Notice—Purging equities. Where a claim to real estate can be sustained only on the ground that the party asserting it is a subsequent purchaser or mortgagee in good faith, such person is required to show affirmatively that he purchased without notice of the equities of the adverse party, relying upon the apparent ownership of his grantor or mortgagor. *Baldwin v. Burt*, 43 Neb. 245 (61 N. W. Rep. 601). One who takes a mortgage on lands with knowledge of another's equitable title takes subject to such equity. *Gore v. Condon*, 82 Md. 649 (33 Atl. Rep. 261). One who buys with notice of another's claim of title takes subject thereto. *Decker v. Decker*, Ia. (61 N. W. Rep. 921). Notice to the agent of one claiming to be a *bona fide* purchaser is

notice to such purchaser. *Ely v. Pingry*, 56 Kan. 17 (42 Pac. Rep. 330).

The law protects a subsequent purchaser without notice buying from one who purchased with notice, whose deed is recorded. *Sayward v. Thompson*, 11 Wash. St. 706 (40 Pac. Rep. 379); Webb, Record Title, § 154. *Pringle v. Dunn*, 37 Wis. 449 (19 Am. Rep. 772); *Wood v. Chapin*, 18 N. Y. 509 (67 Am. Dec. 62); *Sydnor v. Roberts*, 18 Tex. 598. One who deals with the holder of a clear record title will be protected against equities in favor of third persons of which he had no notice. *Thompson v. Whitbeck*, 47 La. 49 (16 So. Rep. 570). One who has acquired rights for value from one having a clear record title is not required to allege that he had no notice of the asserted prior title. *Oliphant v. Burns*, 146 N. Y. 218 (40 N. E. Rep. 980).

Sec. 49. Knowledge of facts sufficient to put one on inquiry. A person who has knowledge of facts sufficient to put a prudent man on inquiry with regard to the existence of an unrecorded deed, and fails to make such inquiry, cannot claim protection as a *bona fide* purchaser under the recording act. Actual knowledge of the existence on the public records of an instrument purporting to be a mortgage of the property he is about to purchase is notice to such purchaser of the existence of the original mortgage, and knowledge of such mortgage, although the same is given by one who appears by the records to have no title to the land, is sufficient to make it the duty of the purchaser to inquire whether the mortgagor, who asserts in the mortgage that he owns the land, is not in fact the owner thereof. If, with such knowledge, he parts with the consideration for the land without making any investigation as to the title of the mortgagor, when such investigation would probably have led to a discovery of such title, he is chargeable with notice of it. But the mere recording of an instrument out of the chain of the title will not, of itself, constitute constructive notice of such instrument, so as to bind one who deals with the apparent owner of the land according to the record, in ignorance of the existence of such instrument. *Doran v. Dazey*, S. Dak. (64 N. W. Rep. 1028). Where one's title papers refer him to a town plat for a more

complete description, he is charged with notice of all the facts to be ascertained by examination of such plat. *Depriest v. Jones*, Va. (21 S. E. Rep. 478). Whenever inquiry is a duty, the party bound to make it is affected with knowledge of all which he would have discovered had he performed the duty. Means of knowledge, with the duty of using them, are, in equity, equivalent to knowledge itself. *Lennig's Ex'rs v. White*, Va. (20 S. E. Rep. 831). The fact that a subsequent purchaser had notice of a prior undocketed judgment, may be inferred from circumstances as well as proved by direct evidence. *Farley v. Bateman*, 40 W. Va. 540 (22 S. E. Rep. 72).

BOUNDARIES.

EPITOME OF CASES.

Sec. 50. Agreements fixing. By agreeing upon a boundary and acting on the agreement, parties may estop themselves from disputing that it is the true line. *Young v. Woollett*, Ky. (29 S. W. Rep. 879). Where it is found that a fence or a wall was erected by agreement of the parties as a monument for a boundary and the same was so erected without fraud or mistake and afterward acted upon by them, a slight variation from mathematical accuracy in fixing its position would not affect its conclusiveness as a boundary. *Beckman v. Davidson*, 162 Mass. 347 (39 N. E. Rep. 38); *Evans v. Kunze*, 128 Mo. 670 (31 S. W. Rep. 123). An agreement respecting a boundary made by the husband of the owner of the land, does not bind such owner unless it be shown that she authorized it to be made or ratified it after it was made. *Mitchell v. Brawley*, 140 Ind. 216 (39 N. E. Rep. 497). In a recent case the supreme court of Michigan say: "The rule is well settled in this state that when parties by mutual agreement and for that express purpose, meet and fix a boundary line, and thereafter acquiesce in the line so established, such line will be considered the true line, although the period of

acquiescence fall short of the time fixed by the statute of limitations for gaining title by adverse possession." *White v. Peabody*, Mich. (64 N. W. Rep. 41.) Citing, *Smith v. Hamilton*, 20 Mich. 488 (4 Am. Rep. 898); *Joyce v. Williams*, 26 Mich. 882; *Stewart v. Carleton*, 81 Mich. 270; *Burns v. Martin*, 45 Mich. 22 (7 N. W. Rep. 219); *Jones v. Pashby*, 67 Mich. 459 (85 N. W. Rep. 152; 11 Am. St. Rep. 589); *Wilmarth v. Woodcock*, 66 Mich. 881 (88 N. W. Rep. 400). Location of boundary lines by an agent authorized to lease premises, for the purpose of informing the tenant as to his rights, will not bind the owner in a subsequent controversy between him and the adjoining owner. *O'Hare v. O'Brien*, 107 Cal. 809 (40 Pac. Rep. 428).

Sec. 51. Evidence—Estoppels.—Presumptions. In cases of disputed boundaries evidence of the understanding of the occupants may be heard. *Swerdferger v. Hopkins*, 67 Vt. 187 (81 Atl. Rep. 158). In a recent case the supreme court of Virginia say: "In a controversy concerning the location or boundary of a tract of land patented by the commonwealth, pursuant to a survey, the calls and descriptions of another survey made by the same surveyor, about the same time or recently thereafter, of a co-terminous or neighboring tract, upon which last-mentioned survey the commonwealth issued a grant, whether to a party to the controversy or to a stranger, is proper evidence upon such question of location or boundary, unless clearly irrelevant." *Reusens v. Lawson*, 91 Va. 226 (21 S. E. Rep. 847). Where the controlling question is the true location of a boundary line, it is not material that a re-survey locating the line as claimed by one of the parties was made under an unauthorized contract. *Hanson v. Tp. of Red Rock*, S. Dak. (68 N. W. Rep. 156). A party may by conduct estop himself from asserting the true boundary. *Peterson v. Sohl*, 141 Ind. 466 (40 N. E. Rep. 910). Where successive owners of a lot have occupied continuously for a period of more than 20 years up to a given line as a boundary, it will be taken as the true boundary as fixed by adverse possession. *Beckman v. Davidson*, 162 Mass. 847 (89 N. E. Rep. 88).

Sec. 52. Running courses—As to when the calls of a deed may be reversed. In a recent case the supreme court of North Carolina say: “It is a fact of which the courts must take and have taken notice that the measurements of boundary lines in making the original surveys for deeds and grants are often, if not always, inaccurate. Those discrepancies between the distance called for and the actual measurement occur much more frequently, too, in an undulating or mountainous section, because as a matter of general knowledge, it often happens that, in the general surveys of grants, only two or three lines of a square or parallelogram were actually run, and that the earlier surveyors, at least, universally adopted surface measurement. In running long lines from the top of one high and precipitous mountain to that of another, the area of acreage sold by the state to its citizens would have appeared much less than it actually was if the level measurement had been adopted in laying off large grants. It is therefore a well-known fact that, owing to inaccuracies in measurement, different results will follow from adopting one or the other of the two methods of surveying where many of the old monuments have perished or been removed. In determining which is correct, the courts proceed upon the idea that the object of legal investigation and inquiry is to find the lines, corners, and monuments which were agreed upon by the parties to the original conveyance, and that, in order to attain that object, the lines should be run in the direction and order adopted by them. *Harry v. Graham*, 1 Dev. & B. 78, 79; *Norwood v. Crawford*, 114 N. C. 519 (19 S. E. Rep. 349). There are some exceptional instances, in which it is manifest that reversing a line is a more certain means of ascertaining the location of a prior line than the description of such prior line in the deed, but such cases are rare exceptions to a well-established general rule. *Harry v. Graham*, 1 Dev. & B. 78, 79 (27 Am. Dec. 226); *Norwood v. Crawford*, 114 N. C. at page 521 (19 S. E. Rep. 349); *Safret v. Hartman*, 7 Jones (N. C.) 203. The general rule is an established law of evidence, adopted as best calculated to ascertain what was intended to be conveyed, and it is incumbent on a party asking the courts to depart from it to show facts which bring the particular case within

the exception to the rule." *Duncan v. Hall*, 117 N. C. 448 (23 S. E. Rep. 362).

Sec. 53. Streams as—High water mark—Low water mark. A conveyance of lands situated upon a navigable stream, the description being by courses and distances from a fixed monument, and establishing a boundary line coincident with the line of navigation, conveys the grantor's title as far as the central thread of the stream. *Lake Shore & M. S. R. R. v. Platt*, 53 O. St. 254 (41 N. E. Rep. 243; 29 L. R. A. 52). The title of a riparian owner on a non-navigable pond or lake extends only to the natural shore. *Noyes v. Collins*, Ia. (61 N. W. Rep. 250; 26 L. R. A. 609). In Kentucky it is held that the riparian owner's rights extend to the middle of the stream, whether navigable or not; and that where there is an island and the channels on either side are practically equal, it should be divided between the opposite owners. *Strange v. Spalding*, Ky. (29 S. W. Rep. 137). In Missouri it is held that on a navigable stream the riparian owner's title extends "only to the water's edge." *Cox v. Arnold*, 129 Mo. 337 (31 S. W. Rep. 592; 50 Am. St. Rep. 450). The Montana Civ. Code, 1895, § 722, is as follows: "Except where the grant under which the land is held indicates a different intent, the owner of the land, when it borders upon a navigable lake or stream, takes to the edge of the lake or stream at low water mark; when it borders upon any other water, the owner takes to the middle of the lake or stream." Under this statute it is held that the title of a riparian owner on a navigable stream extends to the ordinary low water mark, and that he may assert such title in an action of ejectment. *Gibson v. Kelly*, 15 Mont. 417 (39 Pac. Rep. 517). Low water mark and high water mark mean ordinary low water mark or ordinary high water mark, and not that of an exceptionally wet or dry season. *McBurney v. Young*, 67 Vt. 574 (32 Atl. Rep. 492; 29 L. R. A. 539).

Sec. 54. Streams as—Title to submerged lands. The land below high-water mark does not necessarily pass to a grantee of the upland as an incident and appurtenance of the latter, but the submerged land or any part thereof may be reserved upon a sale of the upland, or be made the subject of

separate sale, or be sold with the upland; the question of the intent of the grantor that the submerged land or any part thereof shall or shall not pass with the upland being one of which the solution is to be found in the terms of the deed of conveyance. *Axline v. Shaw*, 85 Fla. 805 (17 So. Rep. 411; 28 L. R. A. 891). Where a person executes a plat of submerged land, extending it a distance of several blocks, streets and alleys beyond the shore line into the water, but not to the point of navigability, and then conveys one of the blocks of this submerged land, in the rear of which are drawn the platted lines of an alley twelve feet wide between the block so conveyed and the outermost line of the alley, and beyond which, in the direction of the line of navigable water, there is an unplatted space of submerged land, it is held that no title or appurtenant right to the unplatted space passed to the grantee of such block, and that his title was limited to the center of the alley. *Gilbert v. Emerson*, 60 Minn. 62 (61 N. W. Rep. 820).

Sec. 55. Meander lines on the margin of non-navigable lakes and ponds. For the purpose of determining the quantity of land for which a purchaser must pay, meander lines are run along the margin of non-navigable lakes and ponds, and not for the purpose of limiting to such lines the title of a grantee or claimant under the United States land laws. By the settled course of the common law and the latest decisions of the land department, a grantee of real property contiguous to such lake or pond takes to the center thereof, ratably with other riparian owners, if there be such; and a timber culture entryman, who has filed upon a lot bordering upon such a lake or pond, receives, upon a full compliance with the law, a patent from the government, which conveys to him a fee-simple title to such lot, together with any reliction to the center of the lake, occasioned by a gradual recession or imperceptible drying up of the water therein after the date of his filing. *Olsen v. Huntamer*, S. Dak. (61 N. W. Rep. 479).

Sec. 56. Highways and streets as boundaries. Where a grantor conveys a lot abutting on a way laid out on his land, with the privilege of using such way, afterwards

conveys another lot, referring to the way as "owned equally" by the adjoining land owners, it is held that the grantees take title in fee to the middle of the way. *Bentley v. Root*, R. I. (82 Atl. Rep. 918). The general rule "that a grant of land bounded upon a highway or river carries the fee in the highway or river to the center of it, provided that the grantor at the time owned to the center, and there be no words or specific description to show a contrary intent," was held to apply although the deed described the land by metes and bounds which carried the land along the side of the highway. *Grant v. Moon*, 128 Mo. 48 (80 S. W. Rep. 828). Citing, *Elliott, Roads & S.* 551; *Gear v. Barnum*, 87 Conn. 229; *Cox v. Freedley*, 83 Pa. St. 124 (75 Am. Dec. 584); *Paul v. Carver*, 26 Pa. St. 228 (67 Am. Dec. 418). A description of land as bounded by an alley which has been located by ordinance and the fences built on the line thereof conveys to the middle of the alley, although the city did not work the alley as located, but afterwards changed its location. *Bliem v. Daubenspeck*, 169 Pa. St. 282 (82 Atl. Rep. 887). Where land is described as running to a highway or as being bounded thereby, the grantee takes to the center of such highway. *Foreman v. Presbyterian Ass'n*, Md. (80 Atl. Rep. 1114). See *Ballards' Annual*, Vol. 2, § 48, and Vol. 3, § 56.

Sec. 57. Monuments, courses and distances. In determining a boundary monuments control distances. *Olson v. Keith*, 162 Mass. 485 (89 N. E. Rep. 410); *Reusens v. Lawson*, 91 Va. 226 (21 S. E. Rep. 347); *Pitman v. Nunnally*, Ky. (82 S. W. Rep. 606). And also field notes and maps of surveys. *City of Mt. Carmel v. McClintock*, 155 Ill. 608 (40 N. E. Rep. 829). In determining a boundary where a line is run from one given point to another, the degrees indicating the course of the line must give way to the monuments. *Logan v. Evans*, Ky. (29 S. W. Rep. 636). Where the original monuments or points at which they were placed are discoverable, the field notes must yield to the original survey made upon the ground. *Robinson v. Laurer*, 27 Ore. 815 (40 Pac. Rep. 1012). Where the original mounds or monuments established during a government survey can be identified and ascertained, they will control course and dis-

tance. Field notes and plats of the original government survey are competent evidence in ascertaining where monuments are located in case a government corner is destroyed, or the point where it was originally placed cannot be found, or the location of the original corner is in dispute; but when it is shown by uncontradicted evidence that a section corner was located by the government surveyors at a certain point, such location must control, even though it is a place different from that given in the field notes and plat. *Peterson v. Skjelver*, 43 Neb. 668 (62 N. W. Rep. 48). In a recent case the supreme court of North Carolina say: "The general rule is that the calls in a grant or deed control in locating the land granted or conveyed. But this general rule is subject to the exception that when a natural object or monument is also called for in the deed or grant susceptible of location, and is identified and located, this will control course and distance as called for in the instrument; and the courts have held the line of adjacent tract, if known and established at the time of issuing the grant or executing the deed, may constitute such natural object or monument. But this exception is put on the ground that the natural object is more certain than course and distance, and these depend upon the correctness of the compass, the accuracy of the surveyor, and the faithfulness of the chain carrier. To take the case out of the general rule that course and distance, as called for in the conveyance, control, there must be another call more certain than course and distance." *Brown v. House*, 116 N. C. 859 (21 S. E. Rep. 988).

Sec. 58. Monuments and streams—Central point intended. Where, in the description of land, a stream or other monument is designated, it is held that the central portion thereof is intended. *Freeman v. Bellegarde*, 108 Cal. 179 (41 Pac. Rep. 289). The court say: "In the absence of any qualifying term, the designation in a conveyance of any physical object or monument as a boundary implies the middle or central point of such boundary, as, for example, if the boundary be road or highway or a stream, the thread of the road or stream will be intended; if a rock, a heap of stones, or a tree be the boundary, the central point of such tree or rock or heap of stones, will be intended. A private grant is to be inter-

preted in favor of the grantee, and, if the grantor is the owner of the monument or boundary designated in his grant, his conveyance will be held to extend to the middle line or central point of such monument or boundary. This rule is not changed by reason of the fact that a stream which is designated as the boundary is a tidal stream, if the grantor of the land is the owner of the bed of such stream. 'When riparian estates are conveyed, the owner may reserve the land under water, but the general presumption is that the purchaser's title extends as far as the grantor owns, in both tidal and fresh waters.' Gould, Waters, § 195. The title to the beds of tidal streams is ordinarily vested in the sovereign, and in such case a grant from the sovereign which is bounded by tidal waters will be construed to extend only to high water mark. *Water Co. v. Richardson*, 70 Cal. 206 (11 Pac. Rep. 695). A grant from the sovereign is to be interpreted in favor of the grantor, contrary to the rule for interpreting grants between private individuals; but if, as in the present case, the sovereign has parted with the title to the land beneath the stream, a grant of the riparian tidal lands by the owner must receive the same construction as a grant by him of any other riparian lands."

CHARITABLE USES.

BLACKBOURN v. TUCKER.

(72 Miss. 735.)

Devise for charity—Constitutional prohibition. The Mississippi Constitution §§ 269, 270, makes devises of land to persons or bodies politic for charitable uses void. This provision is held to apply to a will made before the adoption of the constitution, the testator having died subsequent; and, where the devise is of the residue of an estate real and personal, it may be void as to the real estate and valid as to the personal property.

COOPER, C. J.

Sec. 59. Facts stated—Constitutional provisions. By his will, made on the 17th day of August, 1881, A. L.

Blackbourn, after some small bequests to his wife, the appellant, devised and bequeathed the remainder of his estate, real and personal, to the Senatobia Educational Association, to be by said association applied "in maintaining and keeping in a prosperous condition that institution of learning owned by said association, and known as the 'Blackbourn College for Girls,' in Senatobia, Mississippi, or in both maintaining said college and erecting such additional and suitable buildings to said college as their judgment may dictate, having always in view the best interest of said institution." Blackbourn died on the 1st day of November, A. D., 1898, and his will was presented for probate by Tucker, his executor, on the 4th day of said month. The appellant exhibited her bill in the chancery court of Tate county, in which county the testator had resided, and in which the will was probated, challenging the validity of the devise of the lands, and the bequest of the personal estate to the Senatobia Educational Association, on the ground that said dispositions of his estate by the testator were rendered void by sections 269 and 270 of the constitution of this state. These sections are as follows: "Sec. 269. Every devise or bequest of lands, tenements, or hereditaments, or any interest therein, of freehold or less than freehold, either present or future, vested or contingent, or of any money directed to be raised by the sale thereof, contained in any last will and testament, or codicil, or other testamentary writing, in favor of any religious or ecclesiastical corporation, sole or aggregate, or any religious or ecclesiastical society, or to any religious denomination or association of persons, or to any person or body politic in trust, either express or implied, secret or resulting, either for the use and benefit of such religious corporation, society, denomination or association, or for the purpose of being given or appropriated to charitable uses or purposes, shall be null and void, and the heir at law shall take the same property so devised or bequeathed as though no testamentary disposition had been made. Sec. 270. Every legacy, gift or bequest of money or personal property, or of any interest, benefit or use therein, either direct, implied, or otherwise, contained in any last will and testament or codicil, in favor of any religious or ecclesiastical corporation, sole or aggregate, or any religious or ecclesiastical society, or to any religious denomination or asso-

ciation, either for its own use or benefit, or for the purpose of being given or appropriated to charitable uses, shall be null and void, and the distributees shall take the same as though no such testamentary disposition had been made." The constitution became operative November 1, 1890. The chancellor was of opinion that, since the will was executed before the adoption of the constitution, it was not controlled by the sections of the constitution above set out, although the testator died after they became of force, and, entertaining this view, sustained a demurrer to and dismissed the bill. This ruling of the chancellor presents the question principally argued by counsel, but, as will hereafter appear, the question of the construction of the constitutional provisions, if applicable in the present controversy, is also presented.

Sec. 60. Constitutional prohibition of devises for charity—Retroactive operation. Counsel for appellee, in an exceedingly able and learned brief, contend that to apply the constitution to wills executed before its adoption is to give it a retroactive operation, to annul a valid and lawful disposition of property; and while they concede the competency of such legislation, either by statute or by constitutional provision, they contend that the presumption is against such having been the intention of the framers of the constitution, there being in the instrument no provision that it should have a retroactive operation. It is urged by them that our constitutional provisions are in effect and purpose the same as the English statute of mortmain (9 Geo II. c. 36); and since, they say, the English statute had uniformly been held by the courts of England, and by those of Pennsylvania (in which state alone it is in force), to apply only to wills executed after its passage, it should be assumed that the framers of the constitution intended in adopting our provisions against mortmain to adopt also the construction which had been given to its prototype. It would unnecessarily protract this opinion to enter into a full discussion of the authorities cited by counsel for the respective parties. Nor is it necessary to affirm that in the construction of the act of Geo. II. the English courts were prolonging the controversy that had so long existed between parliament and the ecclesiastics who formerly

presided in chancery. The language of the English act that "no lands or tenements or money to be laid out therein shall be given or charged," etc., is quite different from that of our provisions which condemn the dispositions forbidden when "contained in any last will or testament or codicil or other testamentary writing." At the time of the adoption of the English statute, after-acquired lands could not pass by devise, which was considered in the nature of a conveyance or appointment of an estate then owned, or to which the deviser was beneficially entitled. 1 Jarm. Wills, c. 4. What influence, if any, this fact had upon the English courts, and whether the fact that with us a different statutory rule prevails would lead to a different construction of the same statute, need not be considered. The provisions are not the same. The rule of construction invoked by counsel for appellees that, where the statute of another state which has received judicial construction is adopted, the presumption is that its construction is also accepted, is met by the opposing rule that a change in the words of a prior statute is an indication that the lawmakers intended a different, and not the same, construction to be thereafter adopted. *Rich v. Keyser*, 54 Pa. St. 86; End. Interp. St. § 382. But these rules of construction are not of very great value in determining the question involved, because the very nature and character of the constitutional provisions impel us to the conclusion that they apply to all devises becoming operative by the death of the deviser after their adoption.

Sec. 61. Same—Conflict of authorities. An examination of the cases cited by counsel for the respective parties will show them to have been decided under statutes of three distinct classes: First, statutes limiting or denying testamentary powers, as the statutes of mortmain; second, statutes affording a rule of construction for discovering the intent of the testator; third, statutes regulating the execution and publication of wills. When the purpose is of discovering whether the legislative will was that the statute should operate, what is sometimes, not accurately, called "retroactively," it is manifest that the question is largely controlled by the very nature of the act. We are now dealing with a question falling within the first of the classes of cases as just noted. The stat-

ute of 1 Vict. c. 26, may be taken as illustrating the second class. As a rule, before this statute, where a testator referred to an actually existing state of things, his language was deemed to be referred to the date of the will, and not to his death. 1 Jarm. Wills, p. 288. The act of parliament provided "that every will shall be construed with reference to the real and personal estate comprised in it to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will." Now, if the rule of the construction provided by this statute, which had for its purpose the discovery of the intent of the testator, had been applied to wills theretofore executed, the probability is that the testator would have been made by the law to mean one thing, when in truth he meant another. This would be testing a past transaction by a future rule; and, since the whole purpose of the act was to supply a rule of construction to discover the intention of the testator as disclosed by his words, it is evident that to have applied the statute to a will made at a time when the same words under the then-existing law meant directly the opposite would have resulted in giving a different meaning to his words than that meant by the testator. But, even as applied to such statutes, diametrically opposite rules have been adopted. *Carroll v. Carroll*, 16 How. 275; *Mullock v. Souder*, 5 Watts & S. 198; *Brewster v. McCall*, 15 Conn. 274; *Battle v. Speight*, 9 Ired. (N. C.) 288. *Contra*, *Cushing v. Aylwin*, 12 Metc. (Mass.) 109; *Pray v. Waterson*, 12 Metc. (Mass.) 264; *Brimmer v. Sohier*, 1 Cush. 118. There is a conflict in the authorities as to whether statutes regulating the execution and publications of wills are applicable to wills executed and published before their enactment, as will be seen by reference to the cases cited by counsel for appellant. But the rule is undoubtedly that a statute will be construed to operate on past transactions, especially where no vested rights are affected, if it be necessary thus to apply it in order to effectuate the scheme and purpose of the legislature. An act declared that a person "convicted of felony" should be forever disqualified from selling spirits by retail. It was held that one convicted before the passage of the act was disqualified, as the object of the law was to protect the public from having beer-houses kept by men of bad

character. *Hitchcock v. Way*, 6 Adol. & E. 947; *Ex Parte Guierrez*, 45 Cal. 430; End. Interp. St. 284.

Sec. 62. Limitation upon testamentary power.—The constitutional provisions have no relation to the intention of the testator, nor do they regulate the manner in which he may make and publish his will. The question is not what was his will, but it is what is the will of the people of the state. Manifestly, the purpose of the constitution is to prevent one who will not be charitable at his own expense from being so at the expense of his heir at law. One may yet “sell all he hath, and give to the poor,” but he may not keep his grip on his estate until death relaxes his grasp, and then, at the expense of wife and child, devote it to religious uses. Why should one who, before the adoption of the constitution, had executed a will, over which his dominion remained absolute, stand in any different relation to his family or the public than one who had not? The prohibition is against the thing to be done, and not against the process by which it is done. The limitation is upon testamentary power, and, if it be unjust or retroactive to apply its terms to one who had made a will, why does not the same objection lie in favor of all the people who at the time of the adoption of the constitution had the testamentary capacity to then make wills? The provision certainly, in one sense, takes away a pre-existing power; but it is one existing as much in every citizen then having testamentary capacity as in Blackbourn, who had executed a paper which in no sense bound him or conferred any right upon the persons named therein as legatees. We can see no reason why the prohibition should not operate against Blackbourn’s right to retain his estate during his life, and then disinherit his heirs by devoting it to religious and charitable purposes, which would not also retain it as against all others who before the adoption of the constitution had the power to do so. We are of the opinion that the will is subject to the operation of the constitution.

Sec. 63. Construction of Constitution—Distinction between real and personal property. The remaining question is, to what extent is the will annulled by the constitution? It will be noted that while in § 269, the prohibition is against

devises to religious or ecclesiastical corporations, denominations, societies, or associations of persons, or to any person or body politic in trust, either express or implied, secret or resulting, either for the use and benefit of such religious corporation, society, denomination or association, or for the purpose of being given or appropriated to charitable uses or purposes, § 270 contains no prohibition against bequests of personal property to any person, or body politic in trust for the purpose of its being applied to charitable uses or purposes. Section 269 deals with devises of lands or bequests of money to be raised by the sale thereof. Section 270 with bequests of money, or personal property generally. We are at a loss to conjecture why the subjects of lands or money to be raised by the sale thereof have been dealt with in one section of the constitution and devises or bequests thereof to "any person or body politic for the purpose of being given or appropriated to charitable uses or purposes" have been prohibited, while bequests of money or personalty generally are separately controlled by § 270, in which such bequests are not prohibited. That a distinction between the two classes of property was intended is made manifest by the fact that they are separately provided for in distinct sections, and by the use of carefully selected words, which are not susceptible of receiving the same construction. In § 269, devises of lands or of money to be raised by the sale thereof to persons or bodies politic, to be applied to charitable uses, are prohibited. In § 270, bequests of money or personal property to such persons or bodies politic for charitable uses are not forbidden. We have sought in vain for some principle upon which the two sections might be brought into harmonious reading by construction, but we are constrained to recognize the fact that the subjects are controlled by divergent words, too clear to admit of the same construction. We are therefore of opinion that while under § 269 of the constitution, the devise of lands by the testator is annulled, the bequest of the personal estate is valid, because not prohibited by § 270. Section 269 of the constitution was article 55, and § 270 was article 56, of chapter 35, of the Code of 1857. These articles were dropped from the Code of 1880, and were replaced as the above sections of the constitution of 1890. In *Bostick v. Elliott*, Miss. (So. Rep.), relied

on by counsel for appellant, the bequest was, we think, upheld under article 56 (§ 270 of the present constitution). The figures "55," as written in the opinion, should have been "56." Unless this was the article under which the bequest was upheld, the decision is erroneous. The decree is reversed, the demurrer overruled, and the cause remanded.

WHITFIELD, J., dubitator as to the bequest of personalty.

Sec. 64. Mortmain—Statutes of and their construction. A learned author says: "It is highly probable that the rudiments of the law of charities were derived from the Roman or civil law. One of the earliest fruits of the Emperor Constantine's real or pretended zeal for Christianity was a permission to his subjects to bequeath their property to the Church. This permission was soon abused to so great a degree as to induce the Emperor Valentinian to enact a mortmain law, by which it was restrained. But the restraint was gradually relaxed; and in the time of Justinian it became a fixed maxim of Roman jurisprudence, that legacies to pious uses (which included all legacies destined for works of piety or charity, whether they related to spiritual or to temporal concerns) were entitled to peculiar favor, and to be deemed privileged testaments." Story's Eq. Jur. (12th Ed.) Vol. 2, p. 377, § 1137. Statutes of this character have been rare in this country. 2 Kents Com. (13th Ed.) p. 282. As to the effect of the English statutes of mortmain, see *Perrin v. Carey*, 24 How. U. S. 265 (16 L. Ed. 701).

The New York statute, Laws 1860, c. 360, is as follows: "No person having a husband, wife, child or parent shall, by his or her last will and testament, devise or bequeath to any benevolent, charitable, literary, scientific, religious or missionary society, association or corporation, in trust or otherwise, more than one-half part of his or her estate after the payment of his or her debts, and such devise or bequest shall be valid to the extent of one-half and no more." It is held that the remote heirs of the testator may avail themselves of the provisions of this statute. *Rich v. Tiffany*, 37 N. Y. Sup. 330. It is also held that a testator cannot give to two or more charitable objects more than he can give to a single object, *In re Torrance's Estate*, 37 N. Y. Sup. 583, Citing, *Chamberlain v. Chamberlain*, 43 N. Y. 425; and that where a testator makes a devise invalid under this statute, he is deemed to die intestate as to such portion as is not legally disposed of by the will. *In re Torrance's Estate*, 37 N. Y. Sup. 583, Citing, *Lefevre v. Lefevre*, 59 N. Y. 446. Concerning this statute the supreme court of Massachusetts say: "It seems to us that the statute of New York was intended to apply only to testators who were inhabitants of that state. It is not an act relating primarily to corporations, or designed primarily to limit the amounts they may receive, but it is an act relating to wills, and designed for the protection or benefit of persons interested in the estates of inhabitants of that state. There is nothing in it to prevent a New York corporation from receiving any bequest which may be made to it by an inhabitant of another state, and which may be lawful according

to the laws of the place of his residence." *American Bible Soc. v. Healy*, 153 Mass. 197 (26 N. E. Rep. 404; 10 L. R. A. 766). Citing, *Thompson v Swoope*, 24 Pa. St. 474; *White v. Howard*, 38 Conn. 342; *Society v. Marshall*, 15 Ohio St. 537.

EPITOME OF CASES.

Sec. 65. As to what is a charitable use. It is immaterial how uncertain, indefinite and vague the *cestui que trust* or final beneficiaries of a charitable use, provided there is a legal mode of rendering them certain by means of trustees appointed or to be appointed. *Guilfoil v. Arthur*, 158 Ill. 600 (41 N. E. Rep. 1009). It is held that a gift to a corporation organized for the purpose, with which to purchase land and build residences thereon for the laboring classes, to be controlled so as to "improve the moral, physical and intellectual condition of the youth of this city," and to be let to laborers for rent, and not gratuitously, is a charitable trust. *Webster v. Wiggin*, R. I. (81 Atl. Rep. 824; 28 L. R. A. 510). The court say: "It is urged that the trust is not a charity, because its benefits are not gratuitous, and its special beneficiaries are not required to be poor. But these are not necessary characteristics of a charitable trust. It is enough that the fund shall originally be a gift, if it possess the other qualities of a charity. *Attorney General v. Heelis*, 2 Sim. & S. 67, 77. In *Attorney General v. Corporation of Shrewsbury*, 6 Beav. 220, a grant of right to keep a toll bridge, and apply the tolls to keeping up bridges, gates, towers and wall of the town, is held a valid trust. Gifts to colleges where tuition fees are charged have been invariably sustained. The general benefit to the community derived from the diffusion of knowledge which such institutions promote, is enough to justify their foundation and permanent endowment. So in this trust the building of a colossal fund, as a monument to the founder, is not its object; but, as he expresses it, it is 'to improve the moral, physical and intellectual condition of the youth of this city.' We cannot doubt that the erection and control of such tenements as the donor contemplates will promote the health, morality and intelligence of those classes of citizens who are to occupy them, and, by example and compe-

tition, will tend to improve the sanitary conditions of other estates, whose accommodations are now limited by private interest to mere obedience to the compulsions of law. A charitable trust, in the legal sense, is one which originates from a gift, and which limits property to any public use to which it is lawful to devote property forever. The legality of such appropriations may be established by general rules of law, or by special act of the sovereign power. In either case, if the use is public, the trust is a charity. Instances are common where donations in trust, which would be forbidden by general law, have been upheld because made to corporations authorized by special act or license of the crown to hold property in mortmain. The institution of a perpetual trust of a public nature, by grant of the legislature, though it be not called charitable in the act, is sufficient to make it charitable in the legal sense."

Sec. 66. Church controversies—Title to property. Where a local church organization is a member of an association of congregations having a set of general rules for the government and conduct of all its members and officers, and the orders and judgments of the associations are binding upon the minor organizations or congregations composing it, its decisions, in so far as they relate exclusively to church affairs and government, are absolute, and will be regarded by legal tribunals. Courts which have no ecclesiastical jurisdiction will not review or revise the proceedings during trial by or judgments of church tribunals, constituted by the organic laws of the church organization, where they involve solely questions of the church organization and discipline, or infractions of the laws and ordinances enacted by its ruling for the government of its officers and members. *Pounder v. Ash*, 44 Neb. 672 (63 N. W. Rep. 48); *Powers v. Budy*, 45 Neb. 208 (63 N. W. Rep. 476); *Kuns v. Robertson*, 154 Ill. 894 (40 N. E. Rep. 343). Under the North Carolina Code, ch. 54, a member of a church has such equitable interest in the property thereof, as will enable him to maintain an action for the removal of faithless trustees and the recovery of the property to the purposes for which it was originally intended. *Nash v. Sutton*, 117 N. C. 231 (23 S. E. Rep. 178). It is held that

property given or set apart to a church or religious association for its use in the enjoyment and promulgation of its adopted faith and teachings, is by said church or association held in trust for that purpose, and any members of the church or association less than the whole number will not be permitted to divert it from such use. *Park v. Champlin*, 81 Ia. 141 (64 N. W. Rep. 674; 81 L. R. A. 141). There exists no power in courts of equity to supply lacking remedies for the regulation of the affairs of a church organization within itself. As a voluntary association, it alone has the power, and, if necessary, must itself provide means for the adjustment of all matters with respect to its internal polity which do not affect the rights of the citizen, or the jurisdiction of the state. *Powers v. Budy*, 45 Neb. 208 (68 N. W. Rep. 476).

Sec. 67. Legislative power. The legislature has no power to take the property of one institution devoted to public charity and donate it to another. *State v. Neff*, 52 O. St. 875 (40 N. E. Rep. 70; 28 L. R. A. 409). The court say: "There are two classes of public charities—one where the institutions are public in the broadest sense of that term; that is, they are owned by the state, or some subdivision thereof created for governmental purposes and maintained at the public expense. These institutions are absolutely under the control and management of the public through its proper representatives. As respects them no vested or private rights pertain. It does not follow, however, that, because this class of public charitable institutions are the subjects of absolute public control, another class, whose property consists of private donations, and to which the organized public has contributed nothing, shall also be subjected to such absolute governmental control because the charity they administer has been christened a 'public charity' in legal nomenclature. In common acceptance, colleges are not 'charitable institutions,' although in law they administer a public charity. This means no more than that the public are incidentally benefited by the education of some of its members, the immediate advantage accruing to the individual members who have received instruction. The unbroken current of authority declares that the property of such institutions is private property, and the corporations

themselves private corporations. *Dartmouth College v. Woodward*, 4 Wheat, 518 (4 L. Ed. 629); *Vincennes University v. Indiana*, 14 How. 269 (14 L. Ed. 416); *Inhabitants of Yarmouth v. Inhabitants of North Yarmouth*, 34 Me. 411; *Trustees v. Salmond*, 11 Me. 114; *Trustees v. Foy*, 1 Murph. 58; *State v. Adams*, 44 Mo. 570; *Downing v. Board of Agriculture*, 129 Ind. 443 (28 N. E. Rep. 123, 614; 12 L. R. A. 664); *Board of Education v. Greenbaum*, 39 Ill. 609; *Board of Education v. Bakewell*, 122 Ill. 339 (10 N. E. Rep. 378); *Trustees v. George*, 14 La. 395. When the donors of property devote it to a charitable purpose, and choose an existing or create a new corporation as an instrument by which this purpose is to be effected, they make this instrument their perpetual representative, for that purpose."

COMMUNITY PROPERTY.

[In Vol. II., §§ 70-87, will be found a compilation of the statutes and decisions of the several states and territories on the subject of Community Real Estate. Below we give such amendments, changes, and additional constructions as have been made.]

Sec. 68. California. (See Vol. III, § 80.) A conveyance of property purchased with community funds made to the wife under the directions of her husband, and with the intent that it should become her separate property, operates as a gift from him to her. *Wright v. Wright*, Cal. (41 Pac. Rep. 695). The presumption that property conveyed to a married woman is her separate estate, created by Civ. Code § 164, as amended by Act Mar. 18, 1889, is not overcome by the mere fact that her husband joined with her in a note and mortgage to secure a part of the purchase price, but he paid nothing on account thereof. *Heney v. Pesoli*, 109 Cal. 53 (41 Pac. Rep. 819). Where it is apparent from the will of a husband that he intended to dispose of the community property thereby, including the interest of his wife, her subsequent acceptance and disposition of an estate devised to her by such will, will operate as a confirmation on her part of the disposition made by the will. *In re Smith's Estate*, Cal. (38 Pac. Rep. 950). A will of the husband purporting to devise the community property, which says that it "is made with full knowledge of property rights of husband and wife, and with the knowledge and consent of my said wife," indicates an intention of the testator to dispose of all his property, including the inter-

est of his wife. *In re Smith's Estate*, Cal. (38 Pac. Rep. 950). Under Cal. Civ. Code, §§ 146, 147, upon divorce, the court may make disposition of the community property. *Loveren v. Loveren*, 106 Cal. 509 (39 Pac. Rep. 801). But a decree of the court under this section cannot operate to quiet all the rights of pre-existing creditors. *Frankel v. Boyd*, 106 Cal. 608 (39 Pac. Rep. 939).

Sec. 69. Louisiana. (See Vol. III, § 82.) At the dissolution of the matrimonial community by the death of one of its members, the title to community assets is vested jointly in the survivor and the heirs of the deceased, subject to the payment of community debts; and, as a consequence of the dissolution, the survivor can exercise no further control over the half that has vested in the heirs of the deceased, and can not lawfully incumber it with a mortgage in favor of his individual creditor, whose debt was contracted since the dissolution. Such a mortgage is subject to the community debts; it is not null, but its enforceability is restricted to the residuum after community debts have been discharged, and the mortgagee cannot maintain foreclosure proceedings until such residuum has been determined. *Newman v. Cooper*, 46 La. 1485 (16 So. Rep. 481). The fact of the recordation of a special mortgage, executed by the surviving member of the community, on community property, to secure his separate debt, cannot have the effect of preventing the sale of the property, to satisfy a judgment against the community, because the price bid for it is not sufficient to pay the special mortgage. In such case the judgment has priority, not by the fact of prior recordation, but because of the nature of the debt. *Healey v. Ashbey*, 47 La. 636 (17 So. Rep. 195). The tutrix, who is the widow in community, and who administers the succession as tutrix, and who provokes the sale of the succession property as minor's property, cannot thus destroy the minor's mortgage on her undivided half of the property. *Lyman v. Stroudbach*, 47 La. 71 (16 So. Rep. 662). Where the husband after the death of his wife, disposes in entirety of a particular piece of community property, each of the heirs of the wife has a right of separate action for the recovery of the undivided portion of the property belonging to him which has been alienated. There is no obligation to make the other heirs parties. Vendees of community property sold by a husband after the death of his wife, without authority, can not drive the heirs of the wife to an action against their father upon the minors' mortgage. The property remaining in kind, they have a right to recover it in a petitory action. *Le Bleu v. North American L. & T. Co.*, 46 La. 1465 (16 So. Rep. 501). The separation of the property obtained by the wife dissolves the community. Her renunciation of it is presumed unless she accepts, and the acceptance must be within the time allowed the wife divorced, or separated from bed and board. *Hefner v. Parker*, 47 La. 656 (17 So. Rep. 207).

Sec. 70. Texas. (See Vol. III, § 86.) Property rights in a community estate cannot be determined in a proceeding to ascertain which of two persons is entitled to administer one's estate as his widow. *Chapman v. Chapman*, 88 Tex. 641 (32 S. W. Rep. 871).

Sec. 71. Washington. (See Vol. III, § 87.) Upon the death of the wife her interest vests in her heirs and is not affected by a subsequent conveyance by her husband. Wash. Laws, 1871, p. 70, § 12, applied. *Mabie v. Whittaker*, 10 Wash. St. 656 (39 Pac. Rep. 172). Wash. Laws, 1871, p. 70, § 12, which provides that "the husband shall have the management of all the common property, but shall have no right to sell or encumber real estate except he shall be joined in the sale or incumbrance by the wife" is held to apply to a conveyance of land acquired as community property before the passage of the statute. Hoyt, J., dissenting. *Mabie v. Whittaker*, 10 Wash. St. 656 (39 Pac. Rep. 172). It is liable for debts of a partnership in which the husband is a partner, in the absence of a showing that the firm's business was not for the benefit of the community, and that it has sufficient available property to satisfy the judgment. *Diamond v. Turner*, 11 Wash. St. 189 (39 Pac. Rep. 379). Where a debt is sought to be charged against community property, the wife is a necessary party to the action. *McDonough v. Craig*, 10 Wash. St. 239 (38 Pac. Rep. 1034). Under Hill's Wash. Code, § 1413, which provides that neither the husband or the wife shall be liable for the separate debts of the other it is held that community property cannot be sold to satisfy a debt incurred by the husband as surety. Hoyt and Styles, JJ., dissenting. *Spinning v. Allen*, 10 Wash. St. 570 (39 Pac. Rep. 151). It is held by a divided court that where an applicant for a homestead married after making final proofs and before the patent issues, the legal title when the patent issues, vests in the community and such homestead is taken by purchase, and not by gift. *Kromer v. Friday*, 10 Wash. St. 621 (39 Pac. Rep. 229; 32 L. R. A. 671). The rule of descent prescribed by § 1481 of the Code set out in Vol. 3 Ballards' Annual, § 87, pp. 134, 135, still prevails, but it is made subject to special charges and rules set forth in a recent general statute on descent. Laws, 1895, p. 197, ch. 105.

CONTRACTS.

EPITOME OF CASES.

Sec. 72. Construction of contracts. In construing contracts courts should look to the circumstances attendant upon the transaction, the situation of the parties and the state of the thing granted to ascertain the intention of the parties; for it is the intention of the parties which should govern where such intention can be determined by parol evidence without doing violence to some of the settled rules with reference to

written instruments. *Agne v. Seitsinger*, Ia. (64 N. W. Rep. 836). The intention of the parties and their practical construction of the contract established by their acts thereunder will be followed by the court in construing it. *White v. Amsden*, 67 Vt. 1 (30 Atl. Rep. 972). Where real estate is sent to sale at public auction under a written advertisement, the intention of the seller as to the object intended to be sold, and of the purchaser as to that intended to be bought, is to be ascertained by the advertisement, and not by conversations or letters written between the parties in prior negotiations for a private sale, which had failed and been abandoned. The advertisement binds both parties. Where real property is adjudicated at public auction, everything which is part thereof, as being immovable by destination, passes to the purchaser, without the necessity of specific enumeration in the advertisement. This effect ceases, however, when there are words of exclusion or reservation in the advertisement. *Maginnis v. Union Oil Co.*, 47 La. 1489 (18 So. Rep. 459).

Sec. 73. Contracts for benefit of third parties. A party for whose benefit a contract is made, though not a party thereto, may maintain an action for its enforcement; but this rule does not apply to a mere stranger to the contract who is to derive only an incidental benefit therefrom. *Crandall v. Payne*, 154 Ill. 627 (39 N. E. Rep. 601). The court say: "The purpose and object of the contract were not to benefit him, but were to benefit the parties thereto. We have repeatedly held that, where a contract is entered into for the benefit of one not a party thereto, such third party may have his action for a breach thereof. *Eddy v. Roberts*, 17 Ill. 505; *Brown v. Strait*, 19 Ill. 88; *Bristow v. Lane*, 21 Ill. 194. The case at bar, however, does not come within the reason of those decisions. It would be going too far to hold that a mere stranger to the contract, who was to derive only an incidental benefit therefrom, might recover for a breach of such contract."

Sec. 74. Time and place of performance. Where, as to one of its essential elements, time is the essence of the contract, and the party in whose favor the stipulation as to time was incorporated does not insist on that stipulation, the other party cannot avoid performing his part of the contract

on the ground that he himself did not perform within the time limited, especially where, after the expiration of that time, he has actually filed an equitable petition to compel performance by the other party. *Hamilton v. England*, 95 Ga. 698 (22 S. E. Rep. 697). If the contract specifies no time, the law implies that it shall be performed within a reasonable time, and will not permit this implication to be rebutted by extrinsic testimony going to fix a definite time, because this varies the contract. What is a reasonable time is a question of law. And if the contract specify a place in which articles shall be delivered, but not a time, this means that they are deliverable on demand. *Greenberg v. Cal. Bit. Rock Co.*, 107 Cal. 667 (40 Pac. Rep. 1058).

Sec. 75. Public policy—Illegal contracts. When one promises to pay a compensation for the procurement of an appointment or resignation of a public officer and executes a mortgage upon real estate to secure the sum promised, the mortgage is void and may be cancelled as a cloud upon the title. *Basket v. Moss*, 115 N. C. 448 (20 S. E. Rep. 788). A scheme to dispose of lots by chance is illegal and participants therein are without legal remedy. *Branham v. Stallings*, 21 Colo. 211 (40 Pac. Rep. 896). A contract by property owners, to reimburse one who leases property to the government for postoffice purposes at a greatly reduced rent, is held not to be void as against public policy. *Fearnley v. De Mainville*, 5 Colo. App. 441 (89 Pac. Rep. 78). A statute changing the public policy of a state upon a given subject cannot affect contracts previously made. *Stephens v. Southern Pac. Co.*, 109 Cal. 86 (41 Pac. Rep. 788; 50 Am. St. Rep. 17; 29 L. R. A. 751).

Where a valid city ordinance prohibits real estate brokers from carrying on their business without procuring a license, it is held that an unlicensed broker cannot recover a commission for a sale made, but it is conceded that the sale may be valid. *Richardson v. Brix*, Ia. (68 N. W. Rep. 825). The court say: "It is a general and well established rule of law that, where a statute or valid city ordinance absolutely prohibits the carrying on of such a business as the plaintiff was engaged in without first procuring a license to do so, he

cannot recover for services rendered in that occupation. The ordinance under consideration, in express terms, prohibits the exercise of the calling without a license. In *Pangborn v. Westlake*, 36 Ia. 548, it is said: 'There is no doubt that the well-settled general rule is that, when a statute prohibits or attaches a penalty to the doing of an act, the act is void and will not be enforced, nor will the law assist one to recover money or property which he has expended in the unlawful execution of it; or, in other words, a penalty implies a prohibition, and makes the act illegal and void.' In Bishop on Contracts, § 472, it is said: 'Wages earned by a minor forbidden by a statute to be employed in the particular business, or by a school teacher not having the certificate of qualifications which a statute provides for, or by a broker for services rendered without the license ordained by a statute, * * * cannot be recovered in a judicial tribunal.' See, also, *Dillon v. Allen*, 46 Ia. 299. In *Buckley v. Humason*, 50 Minn. 195 (52 N. W. Rep. 385; 36 Am. St. Rep. 637), it was held that where, by a valid city ordinance, it was made unlawful for any person to exercise within the city the business of a real estate broker without a license, a person so engaged in violation of such ordinance could recover no commission for his services. It will be understood that we do not hold that the contract between the vendor and purchaser would in such case be void."

Sec. 76. Fraud—Actions for deceit. False representations by a third person as to the character of the title to real estate involved in a transaction may be made the basis of a suit for damages by the injured party and in mitigation of damages the motives and intentions of the party guilty of the fraud may be shown. *Nash v. Minnesota T. Ins. & T. Co.*, 163 Mass. 574 (40 N. E. Rep. 1039; 47 Am. St. Rep. 489). In order to sustain an action of deceit against the vendor where the fraudulent representations were made by his agent, the fraud should be made clear and there should be some evidence of participation in, or knowledge of, on the part of the principal, or circumstances which should have put him upon inquiry. *Freyer v. McCord*, 165 Pa. St. 589 (30 Atl. Rep. 1024). In an action in the nature of an action of deceit, it is necessary

not only to show the making of false representations justifiably relied upon, but in addition it must be made directly, and not by conjecture, to appear that, from such false representations and reliance on them, there resulted a direct and actual loss to plaintiff. *Lorenzen v. Kansas City Inv. Co.*, 44 Neb. 99 (62 N. W. Rep. 231); *McCready v. Phillips*, 44 Neb. 790 (63 N. W. Rep. 7); *Short v. Pierce*, 11 Utah 29 (39 Pac. Rep. 474). Where a vendee of land causes a conveyance thereof to be made to a third person, his right of action against the grantor for fraudulent representations inducing the purchase, does not pass to the grantee as appurtenant to the land. *Tyson v. Ranney*, 89 Wis. 518 (61 N. W. Rep. 563).

Sec. 77. Fraud—Representations in matters of opinion. A misrepresentation, the falsity of which will afford a ground of action for damages, or for rescission of a contract, must be as to an existing fact. It must be an affirmative statement or affirmation of some fact, in contradistinction to a mere expression of opinion, which ordinarily is not presumed to deceive. *Wakins v. West Wytheville L. & Imp. Co.*, 92 Va. 1 (22 S. E. Rep. 554); *Max Meadows L. & Imp. Co. v. Brady*, 92 Va. 71 (22 S. E. Rep. 845); *Spence v. Geilfuss*, 89 Wis. 499 (62 N. W. Rep. 529). In a recent case the supreme court of Kansas say; "Representations made by the seller of land of the quantity and the rentals thereof are something more than affirmations or expressions of opinion in regard to the property he is attempting to sell. They are matters lying peculiarly within his knowledge." *Speed v. Hollingsworth* 54 Kan. 486 (38 Pac. Rep. 496). Citing, *Davis v. Jenkins*, 46 Kan. 19 (26 Pac. Rep. 459); *Bowman v. Germy*, 28 Kan. 806; *Stevens v. Matthewson*, 45 Kan. 594 (26 Pac. Rep. 88); *Stewart v. Ranche Co.*, 128 U. S. 383 (9 Sup. Ct. 101; 32 L. Ed. 439); *Paine v. Upton*, 87 N. Y. 827 (41 Am. Rep. 871); *Belknap v. Sealey*, 14 N. Y. 144 (67 Am. Dec. 120); *Schumaker v. Mather*, 133 N. Y. 590 (30 N. E. Rep. 755); *Nelson v. Carrington*, 4 Munf. 332 (6 Am. Dec. 519); *Mitchell v. Zimmerman*, 4 Tex. 75 (51 Am. Dec. 717); *Walling v. Kinnard*, 10 Tex. 508 (60 Am. Dec. 216); *Antle v. Sexton*, 187 Ill. 410 (27 N. E. Rep. 691); *Hanson v. Tompkins*, 2 Wash. St. 508 (27 Pac. Rep. 73); *Dobell v. Stevens*, 8 Barn.

& C. 628, and *Lysney v. Selby*, 2 Ld. Raym. 1118; 1 Sugd. Vend. (Perkins' Ed.) 248-378; *Dimmock v. Hallett*, 2 Ch. App. 21; *Lord Brooke v. Roanthwaite*, 5 Hare 298.

Sec. 78. Fraud—Representations by agent. The vendor who accepts the benefit of a contract made by a real estate broker will be bound by the representations made in procuring the contract for his benefit. *Williamson v. Tyson*, 105 Ala. 644 (17 So. Rep. 836). The court say: "The general rule of law that one who deals with an agent is bound to know the extent of his authority is fully recognized, and one absolutely necessary to the protection of the principal in all actions brought against him founded upon contracts made by an agent. The doctrine is equally as well established, and rests upon sound principles, that a principal who seeks to avail himself of a contract made by another for him, whether by an appointed or a self-constituted agent, is bound by the representations made and methods employed by the agent to effect the contract. We think these principles sustained by the following authorities: *Elwell v. Chamberlain*, 81 N. Y., 611, 619; *Atwood v. Wright*, 29 Ala. 846; *Haskell v. Starbird*, 152 Mass. 117 (25 N. E. Rep. 14; 23 Am. St. Rep. 809); *Busch v. Wilcox*, 82 Mich. 836 (47 N. W. Rep. 828); *Griswold v. Gebbie*, 126 Pa. St. 358 (17 Atl. Rep. 673, and note; 12 Am. St. Rep. 878)."

Sec. 79. Fraud—Representations by executor in making sale of decedent's lands. If administrators, in selling land as the property of their intestate, represented the boundaries thereof as extending along certain lines from point to point, giving the length of each line, and thus misrepresented the extent and contents of the tract, whereby they were enabled to sell, and did sell at a fixed price per acre, a tract of land containing 38.6 acres as a tract containing 50 acres, receiving payment accordingly, the purchaser was defrauded in so far as the money paid represented the price of the deficiency, whether the administrators knew their representations were false or not, provided the representations were accepted and treated by the purchaser as true, and he acted and relied upon them in making his purchase, paying his money, and receiving the conveyance. If the administrators did not know

where the true boundaries of the tract were, they should not have taken upon themselves to point out the same, or make any definite and positive representation concerning them which the state of their knowledge did not enable them to make with verity and correctness. While the doctrine of *caveat emptor* would charge the purchaser with looking out for the title which the decedent had to the tract offered for sale as his, it would not charge him with looking out for the boundaries of that tract when the administrators undertook to locate and point them out, thus professing to know them sufficiently to enable them to furnish this information to purchasers, instead of leaving the latter to their own resources in acquiring the information. *Folsom v. Howell*, 94 Ga. 112 (21 S. E. Rep. 136).

Sec. 80. Fraud—Reliance upon—Diligence of the injured party. The prospective purchaser of real estate has no right to rely upon representations of the vendor as to the quality of the land where he has a reasonable opportunity of examining it and is not prevented from so doing by any artifice of the vendor. *Shepherd v. Goben*, 142 Ind. 818 (39 N. E. Rep. 506). False representations, knowingly made by a vendor to a vendee previous to the sale, as to the character, condition, and value of the property, are presumed to have influenced the mind of the purchaser, even though he had full opportunity to observe and know the actual truth, and the burden is on the vendor to prove clearly that such false representations did not influence the vendee in making the sale. *Turner v. Houpt*, 53 N. J. Eq. 526 (33 Atl. Rep. 28).

In a recent case the supreme court of Kansas say: "Where a contract is induced by false representations as to material existent facts, which are made with the intent to deceive, and upon which the plaintiff relied, it is no defense, to an action for rescission or for damages arising out of the deceit, that the party to whom the representations were made might, with due diligence, have discovered their falsity, and that he made no searching inquiry into facts. 'It matters not,' it has well been declared, 'that a person misled may be said in some loose sense to have been negligent; * * * for it is not just that a man who has deceived another should be permitted to say to him, "You ought not to have believed or

trusted me," or " You were yourself guilty of negligence." " " *Speed v. Hollingsworth*, 54 Kan. 486 (38 Pac. Rep. 496). Citing, Bigelow, Frauds, 528, 528, 584; Kerr, Fraud & M., 80, 81; *Stevens v. Matthewson*, 45 Kan. 594 (26 Pac. Rep. 38); *Davis v. Jenkins*, 46 Kan. 19 (26 Pac. Rep. 459); *Wickham v. Grant*, 28 Kan. 517; *Pomeroy v. Benton*, 57 Mo. 581; *Wannell v. Kem*, 57 Mo. 478; *Redgrave v. Hurd*, 20 Ch. Div. 1; *Fargo Gas & Coke Co. v. Fargo Gas & Electric Co.*, 4 N. Dak. 219 (59 N. W. Rep. 1066), and cases cited; *Simar v. Canaday*, 58 N. Y. 306 (13 Am. Rep. 523); *Schumaker v. Mather*, 133 N. Y. 590 (30 N. E. Rep. 755); *Redding v. Wright*, 49 Minn. 322 (51 N. W. Rep. 1056); *Ledbetter v. Davis*, 121 Ind. 119 (22 N. E. Rep. 744); *Gordon v. Parmelee*, 2 Allen 212; *Mooney v. Miller*, 102 Mass. 217; *Furnace Co. v. Moffatt*, 147 Mass. 403 (18 N. E. Rep. 168); *Erickson v. Fisher*, 51 Minn. 300 (53 N. W. Rep. 638); *Campbell v. Frankem*, 65 Ind. 591.

In a recent case, *Wilson v. Carpenter's Admr.*, 91 Va. 183 (21 S. E. Rep. 243), the supreme court of Virginia say: "No man is bound by a bargain into which he has been deceived by fraud or misrepresentation. Whenever a purchaser has been induced, by a material misrepresentation of the vendor, to buy, he has a right to repudiate the contract; a right correlative with that of the vendor to disaffirm the sale when he has been defrauded. Courts of equity are always open to afford relief in such cases, and false representation of a material fact, constituting an inducement to the contract, on which the purchaser had a right to rely, is always ground for rescission of the contract by a court of equity. *Crumph v. Mining Co.*, 7 Grat. 352 (56 Am. Dec. 116); *Guin v. Byrd*, 32 Grat. 293; *Linhart v. Foreman's Adm'r*, 77 Va. 540; *Iron Co. v. Trout*, 88 Va. 397 (2 S. E. Rep. 713); Pom. Cont. § 12, p. 289. When the seller has made a false representation, which from its nature, might induce the buyer to enter into the contract on the faith of it, it will be inferred that the buyer was induced thereby to contract, and it does not rest with him to show that he, in fact, relied upon the representation. In order to displace this inference, the seller must prove either that the buyer had knowledge of facts which showed the representation to be untrue, or that he expressly stated in

terms, or showed by his contract, that he did not rely upon the representation, but acted upon his own judgment. Nor is the buyer deprived of his right to relief because he had the means of discovering that the representation was false. *Redgrave v. Hurd*, 20 Ch. Div. 1, quoted in Benj. Sales, p. 499."

Sec. 81. Rescission — Inadequacy of price. The intrinsic value of the land at the time of the sale, and the nature of the title, should be examined and inquired into, as matters put expressly at issue, in action for rescission on account of lesion. In a sale of a precarious title to land, without warranty, it is a proper subject of inquiry, what were the vendor's pretensions worth, rather than what was the intrinsic value of the land. In a sale of land acquired at tax title, and again sold by the purchaser, the vendee assuming all taxes due, and some of which were not paid by the vendor, if the amount of the taxes assumed, added to the price, exceeds the limit that would justify the action for lesion, the plaintiff cannot recover. The value of the land must be fixed at the time of the sale, and within fixed limits. If the witnesses state the land was worth from \$1,000 to \$1,200 or \$1,500, the fixed amount of \$1,000 will be taken as its true value. The amounts above this are conjectural and speculative. *Martin v. Delaney*, 47 La. 719 (17 So. Rep. 264). A great disparity between the value and the price paid is not evidence of fraud where both parties have an equal opportunity to know the value. Unless inadequacy of consideration is coupled with some other circumstance such as weakness of mind, a fiduciary relation, pecuniary distress, or the like, it is no ground for setting aside a sale. *Cooper v. Reilly*, 90 Wis. 427 (63 N. W. Rep. 885). One who asserts the failure of consideration or the existence of a legal consideration has the burden of proving it. *Saalfeld v. Manrow*, Pa. St. (80 Atl. Rep. 823).

Sec. 82. Rescission—Defects of title. Where the purchaser of land has been put in possession and has received a deed with general warranty, and his possession has been neither disturbed nor threatened and his grantor is solvent and the existence of the incumbrance complained of was set forth on the face of the deed and no steps had been taken to collect the unpaid purchase money, equity will not rescind a contract

for the sale of land on the ground of a defect in the title. *Max Meadows L. & Imp. Co. v. Brady*, 92 Va. 71 (22 S. E. Rep. 845). In a recent case in which the authorities are collated and reviewed it is held that an executed contract for the sale of land will not be rescinded because there is a failure of title to a portion of the land conveyed, though the remainder of the land, in case the grantee should be evicted from the portion to which the grantor did not have title would be useless for the purpose for which the land was purchased. *Decker v. Schulze*, 11 Wash. St. 47 (89 Pac. Rep. 261; 48 Am. St. Rep. 858; 27 L. R. A. 835). When a party has contracted to convey, or cause to be conveyed, certain real estate to another, in satisfaction of a debt, the title to be made satisfactory to the attorneys of the latter, or the contract to be null and void, the attorneys cannot be permitted in the absence of a substantial defect in the title, to abruptly declare the contract at an end, after the party who is to convey, or cause to be conveyed, has expended quite an amount, and has credited large sums of money upon notes held by him, in obtaining deeds and other instruments demanded by the attorneys, and after there has been performance to such an extent that cancelling the contract will work irretrievable injury, and after the attorneys have made requisition for deeds and other instruments to complete the title, which have been furnished, and have, at least by implication, stated that if such deeds and instruments were forthcoming they would be satisfied with the title. *Boyd v. Hallowell*, 60 Minn. 225 (62 N. W. Rep. 125).

Sec. 83. Rescission—When denied and other relief given. Where two or more persons associate themselves for the purpose of purchasing property, and one of them represents to the others that a particular property can be bought for a designated price, which he procures to be paid by his associates, when in fact he receives the difference between said sum and a less one, he may be compelled to account for such difference without any rescission of the contract, and although the property may be worth all or more than was paid for it. *Seehorn v. Hall*, 180 Mo. 257 (82 S. W. Rep. 648; 51 Am. St. Rep. 562). Where the vendee having paid a

portion of the purchase price and being entitled to a conveyance upon the payment of the remainder, fails and neglects to make such payment and the vendor takes possession of the land, he does not thereby rescind the contract so as to entitle the vendee to recover the money paid, nor does his possession prevent the giving of the conveyance upon the payment of the remainder of the purchase-money. *Morris v. Derr*, 55 Kan. 569 (40 Pac. Rep. 908). Mere delay by one party in the execution of an executory contract whose terms would be satisfied by performance within a reasonable time, does not of itself entitle the other party to rescind. To have this effect, in the absence of express repudiation, the implication arising from the non-performance of the contract must be inconsistent with its being still in force. *Sea Isle City L. & Bldg. Ass'n No. 3 v. McTague*, N. J. L. (81 Atl. Rep. 727). After one party to a contract has partly performed the same it cannot be rescinded unless he can be placed in *statu quo*. The party complaining will be limited to his action for damages. *Hunter v. Holmes*, 60 Minn. 496 (62 N. W. Rep. 1131). The right to have a contract rescinded for fraud in its procurement may be lost by laches or by proceeding under the contract after knowledge of the fraud. *Max Meadows L. & Imp. Co. v. Brady*, 92 Va. 71 (22 S. E. Rep. 845).

Sec. 84. Rescission—Improvements—Rents—Waste. Where there has been no fraud or manifest injustice in the conduct of either party, and the one has enjoyed the use of the land, and the other has enjoyed the use of its accepted equivalent, the general rule of equity now recognized in this court is that, in decreeing a rescission for inability to convey the legal title, the land should be restored to the vendor, without any account for profits, and the price should be refunded to the vendee, without interest; whereby, according to their own estimate of equivalents,—the one deeming the use of the price to him equal to that of the land, and the other deeming the use of the land to him equal to that of the price—they would be each so far reinstated. But if the vendee shall have made valuable and permanent improvements, or shall have committed waste, or otherwise improperly injured the land, there should be an account for the waste, if any, and for improvements, if

any. And this rule is shown to have been adopted and approved in many cases. *Halley v. Winchester Diamond Lodge*, Ky. (30 S. W. Rep. 999).

Sec. 85. Rescission—Particular cases—Practice. One guilty of fraud in obtaining title to real estate will not be permitted, in a suit for rescission, to withhold, out of the moneys received by him upon the sale thereof, his expenses and counsel fees incurred in conducting a litigation between himself and other parties, respecting the title thereto. *Henninger v. Heald*, N. J. Eq. (30 Atl. Rep. 809). It is held that rescission for fraud may be allowed, in a given case, upon condition that the defrauded party, who, in good faith, before discovery of the fraud, disposed of a part of the property received by him in the transaction, shall pay full compensation for the part disposed of, and restore the balance in specie; but this exception to the general rule should obtain only in those cases where it is necessary in order that complete justice may be done. *Hill v. Harriman*, 95 Tenn. 800 (32 S. W. Rep. 202). A complaint by a vendee to rescind a land contract should offer to put the vendors in *statu quo*. *Buena Vista F. & V. Co. v. Tuohy*, 107 Cal. 248 (40 Pac. Rep. 386). For cases which depend upon particular facts and illustrate the right to have a real contract cancelled or rescinded, see *Kraner v. Chambers*, Ia. (61 N. W. Rep. 373); *Hyde v. Heller*, 10 Wash. St. 586 (39 Pac. Rep. 249); *Webb v. Stephenson*, 11 Wash. St. 342 (39 Pac. Rep. 952); *Travelers' Ins. Co. v. Redfield*, 6 Colo. App. 190 (40 Pac. Rep. 195). For cases which depend upon particular facts and illustrate the right of rescission on account of fraud, see *Lion v. McClory*, 106 Cal. 623 (40 Pac. Rep. 12). Where there is a mistake of fact in a collateral matter and the fact is unknown to both parties but the sources of information are equally open to both, such mistake will not afford ground for a rescission of the contract. *Sample v. Bridgforth*, 72 Miss. 298 (16 So. Rep. 876).

CORPORATIONS.

EPITOME OF CASES.

Sec. 86. As to what is an incorporated company. The Mo. Constitution Art. 12 § 4, provides that "the right of trial by jury shall be held inviolate in all trials of claims for compensation, when, in the exercise of the right of eminent domain, any incorporated company shall be interested either for or against such right." It is held that a municipal corporation is not an incorporated company within the meaning of this constitutional provision. *Kansas City v. Vineyard*, 128 Mo. 75 (80 S. W. Rep. 826). The court say: "We do not think a municipal corporation included within the term 'incorporated company.' While an incorporated town or city is a corporation, we do not think it a company in any sense. The term 'incorporated company' is defined as a 'corporation formed for the purpose of carrying on a business for profit.' Rap. & L. Law Dict. Webster gives one definition of the word 'company'; 'a number of persons united for the same purpose, or in a joint concern; as a company of merchants. The word is applicable to private partnerships, or incorporated bodies of men; hence it may signify a firm, house, or partnership; or a corporation, as the East India Company.' A municipal corporation is described by Judge Vories, in *Heller v. Stremmel*, 52 Mo. 812, as including 'organized cities and towns, and other like organizations with political and legislative powers for the local civil government and police regulations of the inhabitants of the particular district included in the boundaries of the corporation.' A municipal corporation is a subordinate branch of the domestic government of a state. *Mayor v. Ray*, 19 Wall. 475 (22 L. Ed. 164). The 'power of local self-government is the distinctive purpose and distinguishing feature of a municipal corporation proper.' Dill. Mun. Corp. § 20. A municipal corporation 'is merely an

agency instituted by the sovereign for the purpose of carrying out in detail the objects of the government.' *Philadelphia v. Fox*, 64 Pa. St. 180. See, also, 12 Am. & Eng. Enc. Law, 952. It will be seen from these definitions that an incorporated company possesses none of the essential features of a municipal corporation, and their purposes are altogether different."

Sec. 87. De facto corporations. "Where there has been a body corporate *de facto* for a considerable period of time, claiming at least to be such, and holding and enjoying property as a corporation, it will be presumed that every mere formal requisite to the due creation of the corporation has been complied with." *Ricketson v. Galligan*, 89 Wis. 894 (62 N. W. Rep. 87); Citing, *Whitney v. Robinson*, 58 Wis. 809 (10 N. W. Rep. 512). Where there exists a general statute under which they may be incorporated, railroad companies, acting under special charters which are subsequently declared void, are *de facto* corporations and their deeds and mortgages will be enforced the same as if they were corporations *de jure*. *McTighe v. Macon Const. Co.*, 94 Ga. 806 (21 S. E. Rep. 701; 47 Am. St. Rep. 158).

Sec. 88. Powers of—Owning land—Taking mortgages. Where the power of a corporation to hold property is limited as to the amount, an amendment of its charter after the death of a testator increasing the amount of property which it may hold, will not enable it to take a greater amount than it was permitted to hold at the time of the testator's death. *Coggeshall v. Home for Friendless Children*, 18 R. I. 696 (31 Atl. Rep. 694). A corporation purchasing real estate and retaining possession of the same cannot defeat an action on its bonds given in payment therefor by showing that they were *ultra vires*. *Seymour v. Spring Forest Cemetery Ass'n.*, 144 N. Y. 333 (39 N. E. Rep. 865; 26 L. R. A. 859). The right of a corporation to hold real estate, or to purchase or hold a lien thereon, cannot be questioned collaterally, but can only be attacked in a direct proceeding instituted for that purpose. *Watts v. Gantt*, 42 Neb. 869 (61 N. W. Rep. 104). A city having no power to make donations or loans to colleges, it was held that a mortgage taken by it from a college association conditioned for the repayment of money loaned to it whenever

such association failed to maintain a college in said city was void. *City of Fulton v. Northern Ill. College*, 158 Ill. 133 (42 N. E. Rep. 138).

Sec. 89. Deeds and mortgages by corporations.

The validity of a mortgage executed by a corporation, upon the order of a majority of its directors, is not affected by the fact that no notice of their meeting was given to an absent director. *Kuser v. Wright*, 52 N. J. Eq. 825 (31 Atl. Rep. 397). A corporation which, after having knowledge of an unauthorized purchase of real estate in its name by its officers and the execution of the purchase money mortgage therefor in the same manner, accepts the benefit of the transaction and treats the land as its own, cannot repudiate the transaction. *Blood v. La Serena L. & W. Co.*, Cal. (41 Pac. Rep. 1017). Where a mortgage of a corporation contains a copy of resolutions described as having been adopted by the board of directors of such corporation, authorizing the execution of the mortgage, no further proof is required to make a *prima facie* showing of authorization by the board of directors. *Hayden v. Lincoln City Elec. Ry. Co.*, 48 Neb. 680 (62 N. W. Rep. 73). Where a party relies upon a deed from a corporation not bearing its seal, it is incumbent upon him to affirmatively show that it was executed by authority of a resolution of the board of directors, entered upon the records of the corporation or that it was ratified by the resolution. *Fudickar v. East Riverside Irr. Dist.* 109 Cal. 29 (41 Pac. Rep. 1024). Where an assignment of a lease in the granting clause, purports to be made in the name of a person who is therein described as the treasurer of an incorporated company, and such named person, as treasurer of and in behalf of such company, sets his hand and the seal of the company to the instrument, the assignment will not be held to be the act of the company. *Norris v. Dains*, 52 O. St. 215 (39 N. E. Rep. 660; 49 Am. St. 716).

In a recent case the authorities are collated and reviewed and it is held that where a deed recited that the consideration was paid to a corporation and that the corporation "conveys, remises and releases" and "will warrant and defend against all persons claiming under it" and concludes "in testimony whereof the (naming the corporation) has hereunto set its

hand by its president" (naming president), and the acknowledgment recites that the within named president of the corporation named, acknowledged that he executed the annexed instrument for the purposes therein contained, there being no seal of the corporation upon the instrument, it appearing that it had a seal, it was not sufficient as a deed of the corporation to pass the title to its property. *Garrett v. Belmont Land Co.*, 94 Tenn. 459 (29 S. W. Rep. 726). As a general rule any corporation having power to own real estate may mortgage the same. *Hunt v. Memphis Gaslight Co.*, 95 Tenn. 186 (31 S. W. Rep. 1006). Where the time for its existence as fixed by law or by its charter has expired, a corporation can not execute a valid deed. *Bradley v. Reppell*, Mo. (32 S. W. Rep. 645).

Sec. 90. Officers of private corporations—Duties and liabilities. Directors of an insolvent corporation, who have claims against the company as creditors, must share ratably with the other creditors in a distribution of the company's assets. They cannot secure to themselves any advantage or preference over other creditors by using their powers as directors for that purpose. These powers are held by them in trust for all the creditors and cannot be used by them for their own benefit. It is to be observed, however, that a person who is a creditor of an insolvent corporation is not deprived of any of his rights as creditor by the fact that he also occupies the position of director of the company. He is merely incapacitated as director from using any of the powers of his position for his own benefit or the benefit of his co-directors. *Bonney v. Tilley*, 109 Cal. 346 (42 Pac. Rep. 439). The officers of a corporation may be held personally liable for its torts. *Nunnally v. Southern Iron Co.*, 94 Tenn. 397 (29 S. W. Rep. 361; 28 L. R. A. 421).

Sec. 91. Changing name of corporation. The legislature may change the name of a corporation. *Lomb v. Pioneer Sav. & L. Co.*, 106 Ala. 591 (17 So. Rep. 670). The court say: "Changes of name by corporations are not infrequent, and have no more effect upon the identity of the corporation than a change of name by a natural person has upon his identity. It affects no rights, nor does it lessen or add to

obligations and duties. If, in the act of incorporation, proceeding from the law-making power, a particular name is given, there cannot be a legal change of it without the assent of that power. Third persons contracting with the corporation have no rights or interests involved in the change, and cannot inquire into, or collaterally assail, the mode of procedure by which it may have been affected. Legislation authorizing the change belongs to that class of legislation which has uniformly been recognized as valid, for the reason that it affects no rights of those who deal with the corporation, does not change the relations of the shareholders to each other or to the corporation, and does not impair the corporate franchises."

Sec. 92. Municipalities—Powers over parks, streets and public grounds. A city has supreme control over streets and pavements and in the exercise of its functions may determine everything in connection with their grading and paving without being subject to any control of the courts; but for any arbitrary or unreasonable arrangement of grades it may become liable to an abutting owner for damages. *McHale v. Easton & B. Tr. Co.*, 169 Pa. St. 416 (32 Atl. Rep. 461). The legislature has power to limit the use of a public park by prohibiting public speaking therein and it may delegate this power to the municipal corporation. *Commonwealth v. Davis*, 162 Mass. 510 (39 N. E. Rep. 113; 26 L. R. A. 712). Municipal authorities may authorize the construction of cellar-ways in sidewalks and a long user of a cellar-way in a sidewalk without objection is evidence from which such authority may be reasonably inferred. *Jorgenson v. Squires*, 144 N. Y. 280 (39 N. E. Rep. 873). A city which is authorized to lay out, widen, alter, and extend streets, and to vacate the same, may vacate part of a street, so as to make it narrower, where it is for the benefit of all the owners of abutting property. Trees growing in a city street are under the control of the city, and it may have them cut down, in order to make room for a sidewalk, even though the fee of the street does not belong to the city. *City of Mt. Carmel v. Shaw*, 155 Ill. 87 (39 N. E. Rep. 584; 46 Am. St. Rep. 311; 27 L. R. A. 580). A city has power to prohibit by ordinance the overflowing of streets and alleys by the property owners, and where such

ordinance provides a penalty for permitting the escape into the streets water from an overflowing well, it is not in conflict with the bill of rights which provides that no man's property shall be taken by law without just compensation. *Staggs v. City of Martinsville*, 140 Ind. 476 (89 N. E. Rep. 241; 49 Am. St. Rep. 209). Where the power exists in a municipality to pass an ordinance, it is held that courts will not inquire as to the reasonableness of such ordinance. A city may by ordinance provide penalties for permitting water from an overflowing well or spring to flow on its streets and alleys. *Staggs v. City of Martinsville*, 140 Ind. 476 (89 N. E. Rep. 241; 49 Am. St. Rep. 209). The summary power vested in municipal officers to remove obstructions from highways and streets cannot be used as a guise to determine disputed rights to property. *State v. Mayor, etc. of South Amboy*, N. J. L. (80 Atl. Rep. 628). For a construction of Kansas City charter with reference to the establishment of boulevards, see *In re Independence Ave. Boulevard*, 128 Mo. 272 (80 S. W. Rep. 778).

Sec. 93. Municipalities — Construction and sale of waterworks. The power to construct a waterworks system for a city is not a necessary incident of its incorporation, but must, like all its other powers, be derived directly from the legislature of the state; and the power to "construct and maintain" such a system implies a duty of the municipality, through its corporate authorities, to maintain and preserve possession for the benefit of the public. When a municipality is vested with its charter with power to construct and maintain a system of waterworks at the public expense and for the public use, and accepts such charter, and proceeds to exercise this authority in the manner designated, by the construction and maintenance of such waterworks at the expense of the citizens of the municipality, the waterworks so constructed and maintained are clothed with a public trust and are devoted to a public use. The waterworks of a city, constructed and maintained by the municipality at the expense of its citizens and for the public use, being held by such municipality charged with a public trust, such trust, and the duty of the municipality under it, cannot be discharged and devolved upon another,

by a sale by the city's common council, without legislative authority, of such waterworks, and the right and duty of the city to maintain and use them in execution of such public trust. *Huron Waterworks Co. v. City of Huron*, S. Dak. (62 N. W. Rep. 975).

Sec. 94. Municipalities—Purchase and sale of realty by. Pennsylvania Statutes, Act April 15, 1884 (P. L. 539); Act June 1, 1888 (P. L. 58), providing for the purchase of lands for a court house by commissioners, construed and held not to authorize any purchase without the approval of two successive grand juries. The recommendation of such grand juries that the commissioners erect a new court house is not sufficient. *Bennett v. Norton*, 171 Pa. St. 221 (32 Atl. Rep. 1112). The provision of § 24, ch. 18, Comp. St., that county boards shall not sell the public grounds of any county without first having submitted the question to the electors thereof, is mandatory, and an express limitation upon the powers of the several counties. A sale of the public property of a county, made without the consent of the majority of the electors voting at an election authorized by law, is a nullity, and passes no title to the purchaser. There is no principle more firmly established or resting on sounder reasons than the rule which requires public bodies, when acting under special powers, to act strictly within the conditions prescribed. There is no authority in this state for the submission to the electors of a county of a proposition to ratify the unauthorized acts of its officers. *Douglas Co. v. Keller*, 43 Neb. 685 (62 N. W. Rep. 60).

Sec. 95. Municipalities—Annexation of territory to cities and towns—Legislative power—Tax collection enjoined. The legislature of this state does not have the power to extend or enlarge the territorial limits of a specially chartered town or city by adding thereto noncontiguous lands—that is, lands entirely separated from the municipality by intervening territory; and the courts may declare the annexation of such noncontiguous territory invalid, and enjoin the collection of municipal taxes upon the property thus sought to be annexed. *City of Denver v. Coulehan*, 20 Colo. 471 (39 Pac. Rep. 425; 27 L. R. A. 751). The court say: "Legis-

lative acts in the matter of extending the boundaries of municipal corporations are to be interpreted and applied according to the essential nature as well as the subject-matter of such legislation. In the nature of things, there must be some limit to legislative power. For example, the legislature cannot extend the municipal boundaries of a city into another state. Legislative acts upon such a subject would have no extraterritorial force. There are some things that in their very nature cannot be accomplished by any human power: A thing cannot be made to exist as a whole and in broken disjointed fragments at one and the same time. A thing essentially single in its nature cannot have a plural existence. Every municipality must have its territorial corpus, in which to exercise its corporate functions and powers. Such corpus may be enlarged or diminished by the action of the legislature. So may the human body grow or diminish by the action or nonaction of its vital forces; but neither the human body nor the municipal corpus loses its identity, its individuality, or its unity by such growth or enlargement. It is a misnomer—a solecism—to speak of a growth of the human body not connected with the body itself. Such a growth is, in fact, not of the body. So, territory not in fact connected with or adjacent to a city cannot be regarded as a part of the municipal corpus, or as an addition thereto, in any true sense of the term.”

COVENANTS.

EPITOME OF CASES.

Sec. 96. Personal covenants. A covenant which, in its nature or otherwise, is personal, cannot be made to run with the land by a provision in a deed that it is to the grantee “his heirs and assigns.” *Mygatt v. Cole*, 147 N. Y. 456 (42 N. E. Rep. 17). In Nebraska, it is held, that where a covenant against incumbrances is broken at the time of the conveyance, it is a personal obligation which does not run with

the land. *Campbell v. McClure*, 45 Neb. 608 (68 N. W. Rep. 920).

Sec. 97. Covenants running with the land. Where the owners of mining land covenanted with a railroad company that, in consideration of such company's contribution of money for the development of their land, they would give all their traffic to and from the same to said company, and so bind their successors, lessees and assigns, it is held that such a covenant runs with the land and is binding upon a purchaser thereof through foreclosure of a mortgage antedating such agreement, such purchaser having accepted all the benefits derivable from the contract and affirmed the same. *Bald Eagle Val. R. Co. v. Nittany Val. R. Co.*, 171 Pa. 284 (88 Atl. Rep. 289; 50 Am. St. Rep. 807).

Sec. 98. Covenants of warranty. By the statute of Kentucky a general "warranty" is equivalent to the several separate covenants in use under the common law. *Smith v. Jones*, Ky. (31 S. W. Rep. 475). A covenant of warranty carries any after-acquired title. *Fordyce v. Rapp*, 131 Mo. 354 (33 S. W. Rep. 57). A general covenant of warranty does not protect the grantee against every adverse claim or suit, however unfounded, for which the grantor is not responsible, but only against persons making adverse claims based upon a legal foundation. *Meservey v. Snell*, Ia. (62 N. W. Rep. 767). Citing, *Akerly v. Vitas*, 23 Wis. 222; *Gleason v. Smith*, 41 Vt. 298; *Underwood v. Birchard*, 47 Vt. 306; *Noonan v. Lee*, 2 Black, 499; Devl. Deeds, § 932. "Covenants of warranty only extend to a title existing in a third person, which may defeat the estate granted by covenantor. They do not embrace a title already vested in the covenantee." *Dillahunt v. Little Rock & Ft. S. Ry. Co.*, 59 Ark., 699 (28 S. W. Rep. 657). A person cannot invoke a breach of warranty between his vendor and the person who has sold to him, unless there be privity between himself and that vendor in respect to the subject-matter of the call in warranty. In the absence of privity, his own contract measures his rights of warranty. *Barkley v. Steers*, 47 La. 951 (17 So. Rep. 438). A grantee with warranty of one who has acquired a title by a swamp-land entry must be defended against one claim-

ing title thereto on account of the United States having set aside the entry and issued muniments of title to him. *Meservey v. Snell*, Ia. (62 N. W. Rep. 767). A husband living with his wife on her land and doing such acts merely as grow out of the marital relation does not acquire such a possession as will carry to their remote grantee the covenants of warranty and quiet enjoyment. Haight and Finch, JJ., dissenting. *Mygat v. Coe*, 147 N. Y. 456 (42 N. E. Rep. 17).

Sec. 99. Covenants against incumbrances. An outstanding lease is an incumbrance. *Clark v. Fisher*, 54 Kan. 403 (88 Pac. Rep. 493). Taxes assessed are not an incumbrance upon land within a covenant against incumbrances until the time fixed by law for them to become a lien. *Bradley v. Dike*, 57 N. J. L. 471 (82 Atl. Rep. 182); but assessments for street improvements are within a covenant against incumbrances, although the exact amount is undetermined. *Lafferty v. Milligan*, 165 Pa. 534 (80 Atl. Rep. 1030). Taxes assessed after the sale of land by a written contract are not an incumbrance "done or suffered from the grantor." *Gheen v. Harris*, 170 Pa. 644 (82 Atl. Rep. 1094). A grantee may maintain an action for a breach of covenant against incumbrances although he had knowledge of the incumbrance prior to the time he took his deed. *Yancey v. Tatlock*, Ia. (61 N. W. Rep. 997); *Clark v. Fisher*, 54 Kan. 403 (88 Pac. Rep. 493).

Sec. 100. Breach of covenants. Liability for a breach of warranty is to be determined by the laws in force when the covenant was made. *Aiken v. McDonald*, 48 S. C. 29 (20 S. E. Rep. 796; 49 Am. St. Rep. 817). Where the action is for a special breach, the special breach averred must be the breach proven. *Walker v. Kirshenr*, 2 Kan. App. 371 (42 Pac. Rep. 596). Where a covenantor is notified by his covenantee of an action brought by one asserting a paramount title and such covenantor assists in defending in the action, a judgment rendered therein declaring the claimant's title to be paramount is conclusive against such covenantor in a subsequent action against him on his warranty. *Graham v. Dyer*, Ky. (29 S. W. Rep. 846). Oral notice of a suit against the covenantee by one holding an incumbrance, given to the husband

of the covenantor, was held insufficient. *Richmond v. Ames*, 164 Mass. 467 (41 N. E. Rep. 671). It is no defense to an action for a breach of warranty, on account of an eviction by a paramount title, to show that if the grantee had gone into possession at the time of the conveyance to him he would have acquired title by adverse possession. *Graham v. Dyer*, Ky. (29 S. W. Rep. 846). Where the grantee in a warranty deed from one not having title conveys part of the premises to another he cannot recover damages for breach of the warranty as to that part until he has satisfied his grantee's claim against him. *Alvord v. Waggoner*, 88 Tex. 615 (82 S. W. Rep. 872). A grantor's covenant to give possession at a certain time is broken by his failure to do so and an action for the breach will lie although the possession be in his tenant, and the statute (Ind. Rev. Stat. 1894, § 7096) provides that "a conveyance of real estate, or any interest therein, by a landlord, shall be valid, without the attornment of the tenant." *Gibbs v. Ely*, 18 Ind. App. 130 (41 N. E. Rep. 851).

Sec. 101. Eviction necessary.—Where the grantee is placed in possession there is no breach of warranty until there has been an eviction, either actual or constructive. *Dillahunt v. Little Rock & Ft. S. Ry. Co.*, 59 Ark. 699 (28 S. W. Rep. 657). A constructive eviction is sufficient. *Meservey v. Snell*, Ia. (62 N. W. Rep. 767). In Kentucky a vendee cannot maintain an action upon his warranty until he has been evicted or his title adjudged inferior in some suit. *Huff v. Cumberland Val. L. Co.* Ky. (30 S. W. Rep. 660). A covenantee is not required to resist an action by the holder of the paramount title until actually dispossessed by legal process, but may recover against his covenantor after voluntarily surrendering to the holder of the better title; he, at most, assuming thereby the burden of establishing that the title which he has thus recognized is paramount. *Chaney v. Straube*, 43 Neb. 879 (62 N. W. Rep. 234); *Walker v. Kirshner*, 2 Kan. App. 371 (42 Pac. Rep. 596).

Sec. 102. Breach of covenant—After-acquired title as a defense. Where it appears, in an action for breach of warranty, that the grantor had no title at the time of his conveyance, but acquired title before the bringing of the suit, the

plaintiff can recover only nominal damages. *Sayer v. Sheffield L. I. & C. Co.*, 106 Ala. 440 (18 So. Rep. 101). The court say: "In *Chapman v. Abrahams*, 61 Ala. 114, it was said: 'It is settled in this state that if one, having at the time no title, convey lands by warranty—even the warranty which the law implies from the employment of the words "grant, bargain, sell and convey,"—and afterwards acquires title, such title will inure and pass *eo instanti* to his vendee. This, by a species of estoppel. *Blakeslee v. Insurance Co.*, 57 Ala. 205; *Carter v. Doe*, 21 Ala. 72, 91; *Stewart v. Anderson*, 10 Ala. 505; *MaGee v. Eustis*, 5 Stew. & P. 426; *Kennedy v. McCartney*, 4 Port. (Ala.) 141.' It may be inquired, what is the effect of such a title inuring by way of estoppel to the grantee? Devlin, in his work on Deeds, lays down the proposition, supported by a vast array of authorities, that: 'Where covenants for title are contained in a deed, the after acquired title will pass with the same effect as if it had originally been conveyed to the grantee and his successors.' 2 Devl. Deeds, § 946. Chancellor Kent, in his commentaries, in speaking of this estoppel, goes further than some authorities, and says: 'The estoppel works an interest in the land. An ejectment is maintainable on a mere estoppel. If the conveyance be with general warranty, not only the subsequent title acquired by the grantor will inure by estoppel to the benefit of the grantee, but a subsequent purchaser from the grantee, under his after-acquired title, is equally estopped, and the estoppel runs with the land.' 4 Kent, Comm. 98. To the same apparent effect, at least, see *Bean v. Welsh*, 17 Ala. 772. Washburn, after stating that the measure of damages for the breach of the covenant of seisin, with few exceptions, is the purchase money and the interest, says: 'An exception to this rule prevailed where one not seised conveyed with covenants of seisin and warranty, and then acquired a title to the estate; for then, as this inured by force of the covenants of warranty to the benefit of the grantee, it was held that he could no longer maintain an action to recover back the purchase money,' Citing, *Baxter v. Bradbury*, 20 Me. 260 (37 Am. Dec. 49); and *King v. Gilson*, 32 Ill. 356 (88 Am. Dec. 269). In the first named of these cases, it is held that the after acquired title inures immediately to the grantee by way of estoppel, and he cannot

elect to reject the title, and recover the consideration money paid, in an action for breach of the covenant of seisin. The court say, quoting from *Somes v. Skinner*, 8 Pick. 52, 'that the general principle to be deduced from all the authorities is, that an instrument, which legally creates an estoppel to a party undertaking to convey real estate, he having nothing in the estate at the time of the conveyance, but acquiring a title afterwards by descent or purchase, does in fact pass an interest and a title from the moment such estate comes to the grantor;' and add: 'The plaintiff by taking a general covenant of warranty, not only assented to, but secured and made available to himself, all the legal consequences, resulting from the covenant. Having therefore under his deed, before the commencement of the action, acquired the seisin which it was the object of both covenants [the after-acquired deeds] to secure he could be entitled to only nominal damages.' In the last case cited by Washburn, the supreme court of Illinois reviews many cases on the subject, including the case from Maine, just referred to, to which it gives full sanction, and concludes, that the exception to the general rule as to damages in such cases, is based upon the fact, that when the covenant is taken, the covenantee pays the money with the design of acquiring title to the land, and not to make a loan, and when he has obtained what he purchased, he has sustained no injury. Technically there has been a breach of the covenant, for which the law gives a right of recovery, but having the title for which he contracted, he can only recover nominal damages—citing, *Cotton v. Ward*, 8 T. B. Mon. 804; *Reese v. Smith*, 12 Mo. 844; *Cornell v. Jackson*, 8 Cush. 506; *Morrison v. Underwood*, 20 N. H. 369; 8 Sedg. Dam. § 976."

Sec. 103. Measure of damages. Where the covenantee acquires the paramount title the measure of damages is the amount necessarily paid for such title, with the necessary expenses incurred in procuring it. *Dillahunt v. Little Rock & Ft. S. Ry. Co.*, 59 Ark. 699 (28 S. W. Rep. 657); *Richmond v. Ames*, 164 Mass. 467 (41 N. E. Rep. 671). One who warrants a title, and is notified to defend an action against his grantee assailing such title and fails to do so, is liable for reasonable attorney fees necessarily expended by his grantee in

successively defending such action. *Meservey v. Snell*, Ia. (62 N. W. Rep. 767); and in Massachusetts it is held that a covenantee may recover reasonable attorney's fees for defending an action against a paramount claim although his covenantor had no notice of the action. *Richmond v. Ames*, 164 Mass. 467 (41 N. E. Rep. 671). In an action for breach of warranty on account of a paramount title, a vendee who has not used or occupied the land is entitled to recover interest on the amount paid for the land from the date of purchase. *Graham v. Dyer*, Ky. (29 S. W. Rep. 846). In an action on the covenant against incumbrance, when the incumbrance is a right of way, and has not been relinquished, the damages are that amount of money which is a just compensation to the plaintiff for the real injury resulting from the incumbrance. *Richmond v. Ames*, 164 Mass. 467 (41 N. E. Rep. 671). In applying a statute (S. C. Act 1824, § 4, p. 24), providing that, in an action on a covenant of warranty, the measure of damages shall be the purchase price with legal interest, it is held that where, in such an action, it appears that the grantee acquired a life estate by the conveyance, which was enjoyed by him and his grantees, the value of such life estate should be deducted, although the grantee bringing the action enjoyed but a small portion of such life estate. *Aiken v. McDonald*, 48 S. C. 29 (20 S. E. Rep. 796). If a subsisting incumbrance absorb the value of the real estate, and the quiet enjoyment be disturbed by eviction by paramount title, the measure of damages is the same as under the action of seisin and warranty, viz., the consideration money, with interest, and costs, and no more. *Pearson v. Ford*, 1 Kan. App. 580 (42 Pac. Rep. 257). As to the measure of damages for breach of covenant to erect buildings on land, see, *McConaghy v. Pemberton*, 168 Pa. 121 (81 Atl. Rep. 996).

Sec. 104. Measure of damages where breach is an outstanding lease. In discussing the rights of the parties in an action by a covenantee against his covenantor for a breach of covenant against incumbrances on account of the existence of an outstanding lease, in the recent case of *Clark v. Fisher*, 54 Kan. 408 (38 Pac. Rep. 498), the supreme court of Kansas say: "Where the incumbrance is an unexpired term of lease,

the general rule, at least in the absence of any special circumstances, is that the measure of damages will be the fair rental value of land to the expiration of the term. The underlying principle is that the damages should be estimated according to the real injury arising from the existence of the incumbrance which, in the case supposed, is presumably and ordinarily the value of the use of the premises for the time during which the vendee has been deprived of such use. *Fritz v. Pusey*, 31 Minn. 368 (18 N. W. Rep. 94); Rawle, Cov. 191; *Porter v. Bradley*, 7 R. I. 542. Where there is a crop upon the land to harvest after the delivery of a deed, special circumstances may exist to increase the measure of damages. In such a case, the value of the crop, less the cost and expenses of taking care and harvesting the same, may be considered in estimating the real injury to the grantee arising from being deprived of the possession of the premises until after the crop is harvested and taken away. In this case, there being no reservation in the deed from defendants to plaintiff, the right of immediate possession of the land passed to the plaintiff. If the defendants had given to the plaintiff the immediate possession of the premises at the time of the delivery of the deed, as they covenanted therein, he would have had the exclusive possession thereof, with all the crops growing thereon. *Chapman v. Veach*, 32 Kan. 167 (4 Pac. Rep. 100); *Robinson v. Hall*, 33 Kan. 189 (5 Pac. Rep. 768).

The trial court seems to have disposed of the case upon the theory that the conveyance to the plaintiff substituted him in the place of the former owner and landlord, and that his only right or interest in the land for the unexpired term of the lease of the tenant was the landlord's share of the crop. The result of this rule would be that an outstanding lease is no incumbrance, as the purchaser is entitled to collect only unpaid rent—nothing more. A purchaser, if he prefers so to do, may recognize the lease of the tenant, and accept the unpaid rent, after he has received his conveyance without any reservations or exceptions. *Smith v. Leighton*, 38 Kan. 544 (17 Pac. Rep. 52). But if he is unwilling to receive the unpaid rent in satisfaction of his damages he cannot be compelled to do so. He is entitled to all his damages for the injury arising to him from the existence of the lease. The defendants cannot avail them-

selves of the plaintiff's knowledge that the tenant was in the open and visible possession of the land at the time he accepted the deed. As between the plaintiff and the tenant, the plaintiff's knowledge would have defeated the recovery of possession; but this would not be so between the plaintiff and defendants after the delivery of the deed."

Sec. 105. Miscellaneous notes. In construing a deed which covenants that the grantors "will warrant specially the land hereby conveyed; that they have the right to convey the said land to the said grantees; that the said grantees shall have quiet possession thereof, free from all incumbrances; that they shall execute such further assurances of said land as may be requisite; and that they have done no act to incumber the same," it is held that the word "specially" governs all the succeeding covenants. *Allemong v. Gray's Adm'r*, 92 Va. 216 (23 S. E. Rep. 298). A true owner of property can avail himself of a judgment against the warrantor of such property. *Burney's Heirs v. Ludeling*, 47 La. 1484 (17 So. Rep. 877).

CROPS AND EMBLEMENTS.

EPITOME OF CASES.

Sec. 106. Title to crops raised by one in possession without right. In a recent case it is held that where the plaintiff in ejectment establishes title, he cannot recover a crop raised and harvested on the land by the defendant's tenant before the judgment in ejectment was rendered, even though the tenant knew that his landlord's title was disputed by the plaintiff. *Johnston v. Fish*, 105 Cal. 420 (38 Pac. Rep. 979; 45 Am. St. Rep. 58). The court say: "The law gives to the plaintiff in ejectment the right to recover from the defendant, either in the same action or in another, the value of use and the occupation of the land, which is termed 'damages for the withholding thereof;' but while the title to the land is undetermined the owner out of possession is not entitled to the

fruits of the land, nor can he, after he has established his right to the possession, recover the fruits of the land from the one who has purchased them from an occupant while such occupant was in the adverse possession. Such a rule would give to the real owner the gross product of the land, irrespective of the labor and expense required in its production. As was said in *Page v. Fowler*, 39 Cal. 412 (2 Am. Rep. 462), 'The very fact that he may recover the rents and profits of the land shows that he cannot recover the crops, for, as was well said in the case of *Stockwell v. Phelps*, 34 N. Y. 363 (90 Am. Dec. 710) the owner of the land in such cases does not recover the value of the crops raised and harvested, but the value of the use and occupation of the land; and the annual crops of grain and grass, which contain both the value of the use of the land and the labor of the farmer, do not, under such circumstances, belong to the owner of the land. It would be an oppressive rule to require every one who, after years of litigation, perhaps, may be found to have a bad title, to pay the gross value of all the crops he has raised; and it would be an inconvenience to the public if the bad title of the farmer to his land attached to the crops he offered for sale, and render it necessary to have an abstract of his title to make it safe to purchase his produce.' In *Brothers v. Hurdle*, 10 Ired. 490 (51 Am. Dec. 400), the court said: 'But when one who is in the adverse possession gathers a crop in the course of husbandry, or severs a tree or other thing from the land, the thing severed becomes a chattel, but it does not become the property of the owner of the land, for his title is divested. He is out of possession, and has no right to the immediate possession of the thing, nor can he bring any action until he regains possession. The owner of the land cannot sue for the thing severed in trover or detinue as a chattel, for it is not his chattel. It did not become so at the time it was severed, and the title to it as a chattel cannot pass to him afterwards, when he regains the possession, by force of the *jus post liminii*.'" The right of an underlessee in crops and emblements cannot be affected by the default of his lessor. *Gray v. Worst*, 129 Mo. 122 (31 S. W. Rep. 585).

Sec. 107. Mortgages and liens upon. As between mortgages upon separate undivided shares of a growing crop, the date of the execution, delivery, and filing of the same is immaterial. The mortgagees have the rights of tenants in common. If a portion of the crop is destroyed by the elements, or is appropriated by a wrongdoer before a division, the balance is to be divided between the mortgagees as if none had been lost or misappropriated, and according to the interests as fixed in the mortgages. *McRae v. O'Hara*, 62 Minn. 148 (64 N. W. Rep. 146). It is held that the owner of land cannot mortgage a future crop to be raised thereon as against a tenant raising the crop on the shares under a lease prior to the mortgage. *Knaebel v. Wilson*, Ia. (61 N. W. Rep. 178). Cal. Civ. Code, § 2956, applied—mortgage of growing crop. *Simson v. Ferguson*, 112 Cal. 180 (40 Pac. Rep. 104). Under Cal. Civ. Code, § 2972, the removal of a mortgaged crop from the land of the mortgagor operates to extinguish the lien of the mortgage. *Horgan v. Zanetta*, 107 Cal. 27 (40 Pac. Rep. 22). Under Ky. Civ. Code, § 694, when several debts are secured by one lien, or by liens of equal rank, and are owned by different persons, and be not all due, the court shall not order a sale of the property until they all mature. *Hendrick v. Robt. Mitchell F. Co.*, Ky. (29 S. W. Rep. 750). The Miss. Code 1892, § 1882, makes the proceeds of a growing crop of a decedent assets for the payment of debts; and under this statute it is held that the fact that the crops are growing on exempted property does not change their character or prevent their becoming assets for the payment of debts. *Dickey v. Wilkins*, Miss. (17 So. Rep. 874).

CURTESY AND DOWER.

EPITOME OF CASES.

Sec. 108. Dower statutes—Retroactive effect. Statutes relative to the inchoate right to dower cannot have a retro-

spective effect. N. J. Act, Mar. 27, 1878, Supp. to Revision, p. 267, construed. *In re Alexander*, 58 N. J. Eq. 96. (80 Atl. Rep. 817) The court say: "It is objected that the act of 1878 does not apply to cases where the marriage from which the right to dower springs was contracted, and the lands in which it is claimed vested in possession in the husband, before the passage of the act. The question involved is the scope of legislative power over dower inchoate at the time of enactment. A review of the numerous decisions bearing on the point, in the hope of extracting some recognized governing principle, would be a profitless task, as the cases develop an irreconcilable contrariety of opinion. Judges affirming the power of the legislature to modify, control, and even abolish, inchoate dower, argue that it is a mere possibility, because it is a right which cannot vest before it becomes consummate by the death of the husband; that it is a mere incident to the marriage relation, established by law and not by contract, and therefore subject to legislative change or destruction: On the other hand, while recognizing that the consummation of dower is contingent on the death of the husband in the lifetime of the wife, other judges argue that inchoate dower is something more substantial than a mere possibility, viz.: that it becomes, coincident with the seisin of the husband, an interest in such real estate. This is based on well known incidents of the right. 'Dower was, indeed, proverbially, the foster child of the law, and so highly was it rated in the catalogue of social rights as to be placed in the same scale of importance with liberty and life.' Park, Dower, 2; Co. Litt. 124b. When it had attached by the seisin of the husband, it could not be discharged by any act of his, although the owner of the fee, without the wife's concurrence. Park, Dower, 5. It is an incumbrance. *Porter v. Noyes*, 2 Greenl. 22 (11 Am. Dec. 80, note at page 89), and, as such, defeats a contract to convey an unincumbered title. *Id*; *Jones v. Gardner*, 10 Johns. 266, and comes within a covenant against incumbrances, *Shearer v. Ranger*, 22 Pick. 447; *Carter v. Denman*, 28 N. J. Law, 260. It is a valuable consideration for a conveyance to a wife, *Bullard v. Briggs*, 7 Pick. 533 (19 Am. Dec. 292); *Garlick v. Strong*, 3 Paige, 440, or for a promissory note to her. *Sykes v. Chadwick*, 18 Wall. 141 (21 L. Ed. 824). The wife may

maintain an action for its protection, *Petty v. Petty*, 4 B. Mon. 215 (39 Am. Dec. 501); *Thayer v. Thayer*, 14 Vt. 107 (39 Am. Dec. 211); or file a bill for the redemption of a mortgage covering it, *Davis v. Wetherell*, 18 Allen, 60 (90 Am. Dec. 177). She must be a party to any suit affecting it. *Vreeland v. Jacobus*, 19 N. J. Eq. 281. That it is an interest in the land from the time of the seisin of the husband, is the law in this state. *Wheeler v. Kirtland*, 27 N. J. Eq. 584. In that case Catherine Kirtland was, and since 1886 had been, the wife of John Kirtland. On the 16th of December, 1869, her husband was the owner of about six acres of land in the county of Essex. On that day a judgment was entered up against Kirtland, the husband. On May 30, 1870, the Essex public road board laid an avenue across the tract, taking 2.18 acres. Damages were awarded to Kirtland, the husband, by reason of the taking and condemning of the same, to the amount of \$15,000. The judgment creditors served a notice on the road board, warning them not to pay the award to Kirtland. Afterwards, by a sale under the judgment, one Whitney became the owner of the rights of Kirtland, the husband, in the premises, and entitled to the interest of the husband in the amount awarded for the portion of the premises condemned. The wife, by her bill, claimed to have an interest in the award, by reason of her inchoate dower in the land so condemned. The court of errors and appeals held that the inchoate dower of the wife was a valuable interest in the land condemned, the value of which passed into the award by the transmutation of the land into money, and that she was entitled to the amount decreed in her favor by the chancellor. Judge Reed, in giving the opinion of the court, refused to follow the cases of *Gwynne v. City of Cincinnati*, 8 Ohio 24, and *Moore v. City of New York*, 8 N. Y. 110 (59 Am. Dec. 473), upon which many of the decisions will be found to be based. The case of *Wheeler v. Kirtland* expressly declares that inchoate dower is a valuable interest in land, and brings it within the protecting clause of the constitution, which provides that private property shall not be taken for public use without just compensation. If this is so, on what principle can it be said that it is not also within the rule of legislative inhibition that private property shall not be taken for private use with or without compensa-

tion — a rule which, if not corollary from the clause quoted, springs out of the first clause of the bill of rights of our constitution, which declares that the right of acquiring, possessing, and protecting property is unalienable. Under that rule, it is not competent for the legislature, by enactment, to take the property of A. and give it to B., nor, under the principle of *Wheeler v. Kirtland*, to take a valuable interest in land, which A. has acquired, and transfer it to B. This inhibition of arbitrary legislation as to a right in property is not confined to a transfer of it from one person to another, but extends to attempts to impair its value or weaken its security. As the inchoate right of dower of Mrs. Mary Ann Alexander had, by her marriage and the seisin of the husband, attached to the land in question prior to the passage of the act, I am of opinion that its provisions do not apply to her interest therein.”

Sec. 109. As to when the widow is entitled to dower. Where land purchased by a wife is conveyed to her and such conveyance is set aside as a fraud upon her husband's creditors, he has no seisin therein on account of which she can claim dower. Va. Code, 1887, § 2267, applied. *Grant v. Sutton*, Va. (22 S. E. Rep. 490). Dower may be asserted in land purchased by a husband which he has caused to be conveyed to another as his mere nominal trustee, where the statute (Ind. Rev. Stat., 1894, § 3403) provides that all instruments creating a mere nominal trust “shall be deemed a direct conveyance or devise to the beneficiary.” *Stroup v. Stroup*, 140 Ind. 179 (39 N. E. Rep. 864; 27 L. R. A. 523). Where a partnership is insolvent a widow of a deceased member thereof cannot claim dower in the partnership real estate. *Sparger v. Moore*, 117 N. C. 449 (23 S. E. Rep. 359).

Sec. 110. Loss of dower. A wife may release her dower by a conveyance executed under a power of attorney. *Bertschy v. Bank of Sheboygan*, 89 Wis. 473 (61 N. W. Rep. 1115). Her dower right in land is unaffected by her conveyance of such land at a time when she had no title thereto. *Anderson v. Smith*, 159 Ill. 93 (42 N. E. Rep. 306). Sand. & H., Ark. Dig., 706, which provides that “a married woman may relinquish her dower in any of the real estate of her husband by joining with him in a deed of conveyance thereof, and

acknowledging the same in the manner hereinafter prescribed," is held to apply to the conveyance of an estate held by the husband for the life of another. *Stull v. Graham*, 60 Ark. 461 (31 S. W. Rep. 46). Ala. Code, §1894, applied—release of dower. *Curry v. Amer. F. L. Mort. Co.*, 107 Ala. 429 (18 So. Rep. 328). Ga. Code, § 1969, applied—relinquishment of her rights by a wife. *Montgomery v. Payne*, 98 Ga. 600 (20 S. E. Rep. 127). In applying Ohio Rev. Stat., § 5699, which provides that where the wife secures a divorce from her husband, by reason of his aggression, she shall, among other things, if she survives him, "be entitled to her right of dower in the real estate of her husband, not allowed to her as alimony, of which he was seized at any time during coverture, and to which she had not relinquished her right of dower," it is held that a divorced wife cannot claim dower in lands previously allotted to her as alimony. *McKean v. Ferguson*, O. St. (42 N. E. Rep. 254).

Sec. 111. Loss of dower by sale of land. A sale of the real estate of the husband under execution, on a judgment against him alone, followed by judicial confirmation and conveyance, does not extinguish the inchoate dower right of the wife in such real estate, and upon the death of the husband the wife is entitled to have her dower assigned out of such real estate. *Butler v. Fitzgerald*, 43 Neb. 192 (61 N. W. Rep. 640; 27 L. R. A. 252). Dower is not lost by the sale of land on a foreclosure, in an action against the widow and her children, where the decree provides that "the question of dower was not raised or adjudicated in this action." *Hill v. Gray*, S. C. (22 S. E. Rep. 802). In Missouri it is held that a widow cannot claim dower in lands acquired by a railroad company, either by conveyance or condemnation, from her husband's grantee holding under a deed in which she did not join. Black, C. J., and Macfarlan and Gantt JJ., dissenting. *Baker v. Atchison, T. & S. F. R. Co.*, 122 Mo. 396 (30 S. W. Rep. 301). See dissenting opinion for extensive review of authorities against the holding. The opinion of the majority follows the cases of *Venable v. Wabash W. Ry. Co.*, 112 Mo. 103 (20 S. W. Rep. 493; 18 L. R. A. 68); *Chouteau v. Mo. Pac. Ry. Co.*, 122 Mo. 375 (22 S. W.

Rep. 485), epitomized in Ballards' Annual, Vol. 3, § 136, p. 185. For concurring opinion of Barclay, J., in the last case, see *Chouteau v. Missouri Pac. Ry. Co.*, 122 Mo. 875 (80 S. W. Rep. 299).

Sec. 112. Assignment of dower. An action for dower cannot be defeated by showing that the widow has maintained a previous action for dower in other lands. *Elyton Land Co. v. Denny*, Ala. (18 So. Rep. 561). Adverse possession for any period short of twenty years is not sufficient to bar an action for dower. *Elyton Land Co. v. Denny*, Ala. (18 So. Rep. 561). Where a tract of land, exclusive of the mortgage on it, is assigned to the widow as dower, being valued as one-third of the estate of the decedent, she is bound to pay one-third of the interest on the mortgage debt; and where she purchases such mortgage, the rate of interest between herself and the remainder-man is the legal rate of interest, and not that stipulated in the mortgage. *Hodges v. Phinney*, Mich. (64 N. W. Rep. 477). Upon a historical review of the statutes of Delaware, it is held that the Orphans' Court has no power to refuse an order to assign dower upon any other defense than one which would be available at law. *McCaulley v. McCaulley*, 7 Houst. (Del.) 102 (80 Atl. Rep. 735). Fla. Laws, 1872, ch. 1869, § 16, construed and applied—reversal of judgment in action for dower—commencement of new action—statute of limitations. *Henderson v. Chaires*, 85 Fla. 423 (17 So. Rep. 574). In construing Neb. Comp. Stat., ch. 23, § 7, providing that "when a widow shall be entitled to dower out of any lands which shall have been aliened by the husband in his life time, and such lands shall have been enhanced in value after the alienation, such lands shall be estimated in setting out the widow's dower, according to their value at the time when they were so aliened," it is held that in such case the value of real estate is to be estimated as at the time of the assignment of dower, excluding the increase in value of the real estate resulting from improvements made thereon by the alienee subsequent to the date of alienation. *Butler v. Fitzgerald*, 43 Neb. 192 (61 N. W. Rep. 640; 27 L. R. A. 252).

In construing McClel. Fla. Dig., p. 477, § 10, which

requires the executors and administrators of the estate to set apart the widow's dower as soon as practicable, it is held that where they fail to set apart to her as her dower her one-third part of the lands of the estate, and prevent her getting possession thereof, she becomes entitled to one-third part of the net rents and profits arising from all the lands of the estate during the time that her portion of the land itself is withheld from her after the death of her husband; and she becomes entitled to such rents and profits at the time, each year, that the same is received by the executors, together with interest at the legal rate, if it is not paid to her, from the time, each year, that it is received by the executors. In arriving at the amount of such net rents and profits, deductions should be made from the gross rents for the annual taxes assessed on the lands, and for all amounts necessarily expended in keeping the premises in repair or condition to command rents. The general rule in arriving at the gross amount of such rentals is not what the executors may actually have received as rents, but to take the actual rental value of the land for each year, such as it may be proven to be worth. *Henderson v. Chaires*, 85 Fla. 428 (17 So. Rep. 574).

Sec. 113. Curtesy of husband. A husband is entitled to curtesy in an equitable estate of his wife, *Ogden v. Ogden* 60 Ark. 70 (28 S. W. Rep. 796; 46 Am. St. Rep. 151); *Meacham v. Bunting*, 156 Ill. 586 (41 N. E. Rep. 175); and in an estate tail of his wife although such estate of the wife terminated at her death on account of failure of issue, *Holden v. Wells*, 18 R. I. 802 (31 Atl. Rep. 265). His estate by curtesy is subject to existing incumbrances on the land, in the execution of which he has joined. *Campbell v. McBee*, 92 Va. 68 (22 S. E. Rep. 807). Where land in which a husband has an estate by curtesy is subject to a mortgage the proceeds arising from its sale under such mortgage must be applied so as to affect the interests of the husband and the heirs at law proportionately. *In re Freeman*, 116 N. C. 199 (21 S. E. Rep. 110). Mont. Act, Jan. 12, 1865, providing that certain real estate of a married woman shall be exempt from all debts and liabilities of her husband, does not deprive him of his estate by curtesy therein. *Allen v. Roush*, 15 Mont. 446 (39 Pac. Rep.

459). Va. Acts 1877-78, p. 248, § 2, applied to a particular conveyance which is held to bar the husband's right to curtesy. *Hutchings v. Commercial Bank*, 91 Va. 68 (20 S. E. Rep. 950), modifying a former opinion in the same case epitomized in Ballards' Annual, Vol. 8, § 137. As to effect of divorce on the right to curtesy, see Divorce.

Sec. 114. Miscellaneous notes. An unassigned dower right cannot be conveyed. *Anderson v. Smith*, 159 Ill. 98 (42 N. E. Rep. 806); *Salem National Bank v. White*, 159 Ill. 136 (42 N. E. Rep. 812). A widow who has dower in lands upon which she does not live has no right to cut wood therefrom for sale or for use on another estate. *Noyes v. Stone*, 163 Mass. 490 (40 N. E. Rep. 856). A lien for purchase money is paramount to the right of dower of the widow of the purchaser. *Roush v. Miller*, 39 W. Va. 638 (20 S. E. Rep. 668); *Whetstone v. Baker*, 140 Ind. 213 (39 N. E. Rep. 868). See Mortgages—Purchase money mortgage. Where lands are subject to a widow's dower and are sold without her consent the sale must be made subject to her rights. *Stein v. Stein*, 80 Md. 806 (80 Atl. Rep. 703). Md. Code, Art. 16, § 43, applied—sale of land with consent of widow. *Stein v. Stein*, 80 Md. 806 (80 Atl. Rep. 703). Under a statute (S. C. Rev. Stat. 1872, p. 441, ch. 85, § 10), providing that the acceptance of a distributive share by a widow will bar her claim of dower, it is held that the acceptance of dower bars the widow's claim to a distributive shares as heir. *Glover v. Glover*, S. C. (22 S. E. Rep. 739). In Delaware it is held that a jointure cannot be affected by a postnuptial agreement. *McCaulley v. McCaulley*, 7 Houst. (Del.) 102 (30 Atl. Rep. 735). For conveyances in fraud of dower, see Fraudulent conveyances.

DANGEROUS PREMISES.

EPITOME OF CASES.

Sec. 115. Liability for injury caused by. A person cannot be made liable for neglect of a statutory duty unless that duty is clearly imposed upon him. An owner cannot be liable for a duty imposed upon a tenant, nor a tenant for a duty imposed upon the owner. *Behler v. Daniels*, R. I. (81 Atl. Rep. 582). Where a city charter requires the abutting lot owner to keep his sidewalk in a safe condition under the direction of the superintendent of streets, he is not thereby rendered liable for personal injuries caused by a defect in the sidewalk. *Toutloff v. City of Green Bay*, 91 Wis. 490 (65 N. W. Rep. 168). The railroad company placing piles in navigable waters to protect the bridge laid under legislative authority, must use all necessary protections for the security of commerce; and if, because precautions were not used, a vessel is lost or injured by contact with the pile structures, the company will be responsible. *Darrall v. Southern Pac. R. Co.*, 47 La. 1455 (17 So. Rep. 884). Cases which depend upon particular facts and illustrate the liability of owners or lessors of dangerous premises. *Bolton v. Waller*, Ia. (64 N. W. Rep. 688); *Stackhouse v. Vendig*, 166 Pa. St. 582 (81 Atl. Rep. 849).

Sec. 116. Invitation—Distinction as to children. A proprietor of dangerous premises is liable for injuries caused by their being unguarded or unprotected only to such persons as come upon the premises by invitation either express or implied. *South Bend Iron Works v. Larger*, 11 Ind. App. 367 (39 N. E. Rep. 209). The owner of a vacant lot, upon which is situated a pond of water or dangerous excavation, is not required to fence it, or otherwise insure the safety of strangers, old or young, who may resort to said premises, not

by invitation, express or implied, but for the purpose of amusement, or from motives of curiosity. *Richards v. Connell*, 45 Neb. 467 (63 N. W. Rep. 915). Firemen have a right to enter premises to stop a fire; but it is under the same law which allows others to enter, called "the law of overruling necessity," but there is no relation between a fireman and a tax payer that will imply an invitation such as is necessary to create a liability on account of dangerous premises. *Behler v. Daniels*, R. I. (81 Atl. Rep. 582). In a recent case the authorities are collated and reviewed and it is held that a city holding land as a private owner is chargeable with the same duty of keeping it free from nuisances as a private person, and that while the law does not require the owner of premises to keep them in a safe condition for the benefit of trespassers there is an exception as to children of tender years who are injured upon the unguarded premises by reason of their having been attracted thereon by dangerous things, the real danger of which they were not able to comprehend. This ruling is put upon the ground that unguarded premises which are supplied with dangerous attractions are regarded as holding out implied invitations to such children. *City of Pekin v. McMahon*, 154 Ill. 141 (89 N. E. Rep. 484; 45 Am. St. Rep. 114; 27 L. R. A. 206). A contrary rule seems to prevail in Massachusetts. *Grindley v. McKechnie*, 168 Mass. 494 (40 N. E. Rep. 764).

Sec. 117. Injury to trespasser upon dangerous premises. In a recent case the supreme court of Georgia say: "The mere maintenance upon his enclosed premises of a dangerous nuisance gives no right of action against the owner in favor of any person who may enter thereon without invitation, either express or implied, from the owner. Nor does it give a right of action as against one who voluntarily, without necessity and without invitation, deviates from the highway adjacent thereto, and, entering upon the premises, is injured in consequence thereof. Every man has a right to presume that upon his own premises, guarded by a clearly-marked and clearly-defined inclosure, other persons will respect his rights of property and will not intrude upon the privacy thereof; and if upon such premises he maintains a dangerous nuisance,

as a pitfall or other like contrivance, and a stranger, without invitation, either express or implied, enters thereon, he should take all those risks resulting from mere negligence of the owner which he may encounter on the venture. With reference to uninclosed premises, a different rule prevails; and if, upon such premises, the owner shall maintain a dangerous nuisance, in such situation as that persons lawfully entering thereon, without fault upon their own part, suffer injury, he is answerable in damages. If the owner of premises, inclosed or uninclosed, maintains thereon a dangerous nuisance, and the character of the nuisance be of such an obviously dangerous nature as that a person of ordinary prudence, in the exercise of ordinary care, could have readily discovered the dangerous character of such nuisance, and nevertheless exposes himself to its dangers, and in consequence is injured, he can not recover, for this may be classed as the voluntary exposure of one's person to an unnecessary hazard. It comes within the provision of the Code that if one, by the exercise of ordinary and reasonable care, could have avoided the consequences to himself of a negligent act upon the part of another, but fails to exercise such care, and is injured, he is not entitled to recover." *Hutson v. King*, 95 Ga. 271 (22 S. E. Rep. 615).

Sec. 118. Buildings—Duty of owner in respect to. The owner of a building is not an insurer against accident from its condition, but, so far as the exercise of ordinary care will enable him to do so, he is bound to keep it in such condition that it will not, by any insecurity or insufficiency for the purpose to which it is put, injure any person rightfully in, around or passing it. Where a building falls without any apparent cause, in the absence of explanatory circumstances, negligence will be presumed, and the burden is upon the owner of showing that he exercised ordinary care to keep it in a safe condition; but where it appears from such explanatory circumstances that the cause of the fall of the building was a latent defect in its construction, and there is no evidence tending to connect such cause with the owner's negligence, the burden rests upon the party asserting such negligence to show that such cause might have been discovered and removed before the accident by the exercise of ordinary care on the

part of the owner. *Ryder v. Kinsey*, 62 Minn. 85 (64 N. W. Rep. 94).

Sec. 119. Fall of a building while in the possession of a third person for repairs. In a recent case it is held that the owner of a building was liable for damages occasioned by its fall while in the possession of an insurance company for repairs, it appearing that such owner was aware of the defect and danger and took no steps to prevent the accident. *Knoop v. Alter*, 47 La. 570 (17 So. Rep. 139). The court say: "Assuming that the relation was that of contractor, the owner, as well as the contractor, would be responsible to a third person for any injury by his negligence in a matter not included in the contract. This principle was followed in a case presenting similar points to the case under consideration. *Gorham v. Gross*, 125 Mass. 232 (28 Am. Rep. 234). In *Walker v. McMillan*, 6 Can. Sup. Ct. 241, it was decided, if a damage is caused by the fall of a wall in putting up a building forbidden by ordinance, both owner and contractor are liable. In the case of *Insurance Co. v. Werlein*, 42 La. Ann. 1047, 1058 (8 So. Rep. 435), this court gave its sanction to the principle that the owner whose property is in the hands of the assurers must reasonably exert himself to prevent damages. The dual responsibility of the employer and the contractor is recognized in *Davie v. Levy*, 39 La. Ann. 555 (2 So. Rep. 395; 4 Am. Rep. 225), in which the cases of *Robbins v. Chicago City*, 4 Wall. 679; *Inhabitants of Lowell v. Boston & L. R. Corp.*, 23 Pick. 24; *Storrs v. City of Utica*, 17 N. Y. 104 (72 Am. Dec. 437); and *Water Co. v. Ware*, 16 Wall. 567 (21 L. Ed. 485), are approvingly cited. In France, on this point, the laws are more favorable to the proprietor, and greater responsibility is imposed upon the architect and contractor. Nevertheless, there, as it is here, the proprietor of the building is responsible for the damages caused by its ruin, when due to defective construction. The responsibility is even more general. It exists, not only in case of ruin, but arises as soon as a defect of construction damages a neighboring building. The owner of the damaged property has a right of action against the proprietor, and the latter has the right to sue the architect or

contractor. The proprietor selects the architect and contractor he wishes to employ, and can make such stipulations as he deems proper to protect his interest; whereas, the neighbors are strangers to the agreement between the architect and the employer. The law is alive to their interest, it being blended with the public interest. 26 Laurent, p. 76; Aubry et Rau, tit. 4, p. 534, and note 82, par. 874; Dalloz. 1866, § 294. The question being general, the safety of persons cannot be made subordinate to verbal and indefinite agreements between the insurer and the insured."

Sec. 120. Municipalities and public officers. Where a city has exclusive control and management of its streets with power to raise money for their construction and repair, a duty arises to the public to keep the streets in reasonably safe condition for use in the ordinary modes of travel and it is liable to respond in damages to those who are injured by neglect to perform such duty. *Sutton v. Snohomish*, 11 Wash. St. 24 (39 Pac. Rep. 273; 48 Am. St. 847). Citing, Shear. & R. Neg. (4th Ed.), § 289; 2 Dill. Mun. Corp. (4th Ed.), § 1017; Elliott, Roads & S., p. 446; Jones, Neg. Mun. Corp., 88 *et seq.*; Cooley, Torts (2d Ed.) 746; *Weightman v. City of Washington*, 1 Black, 89 (17 L. Ed. 52); *Barnes v. District of Columbia*, 91 U. S. 540 (23 L. Ed. 440); *District of Columbia v. Woodbury*, 136 U. S. 450 (10 Sup. Ct. Rep. 990); *Hutchinson v. City of Olympia*, 2 Wash. T. 314 (5 Pac. Rep. 606); *Morgan v. Morley*, 1 Wash. St. 464 (25 Pac. Rep. 333). This doctrine is supported by *Saylor v. Montesano*, 11 Wash. St. 328 (39 Pac. Rep. 653). In a recent case it is said: "Where a corporation permits the discharge of water from adjoining houses to be obstructed, or permits the water to be discharged on its walk by some artificial means, and there allowed to freeze, in such case its own act of wrongdoing contributes to the accumulation of the dangerous ice, and the corporation will be held liable. Here the ice is the result of an artificial, not of a natural cause. Where a municipal corporation has permitted ice and snow to accumulate and remain upon sidewalks of a large city in the business part thereof for an unreasonable time, in a rounded, uneven, and dangerous condition, and an injury occurs by reason thereof to one who

is properly using the walk, the municipality is liable." *Scoville v. Salt Lake City*, 11 Utah 60 (89 Pac. Rep. 481). Citing, Elliott, Roads & S., p. 459; *Collins v. Council Bluffs*, 32 Ia. 824 (7 Am. Rep. 200); *McLaughlin v. City of Corry*, 77 Pa. St. 109 (18 Am. Rep. 482); *Luther v. Worcester*, 97 Mass. 268; *Morse v. Boston*, 109 Mass. 446. Under the laws of Idaho, county commissioners are not individually liable in damages for injuries sustained by reason of defective highways. *Worden v. Witt*, Idaho (89 Pac. Rep. 1114). A city is liable where it permits trap doors to be constructed in a sidewalk and injury results therefrom. *Sweeney v. Butte*, 15 Mont. 274 (89 Pac. Rep. 286). A municipal corporation is not an insurer against accident upon its streets and sidewalks. It is held to reasonable care only in keeping them free from nuisance. Impracticable things are not required nor is the municipality bound to anticipate improbable or unprecedented events and provide against their possible results. *Village of Oak Harbor v. Kallager*, 52 O. St. 188 (89 N. E. Rep. 144). A complaint to recover damages on account of dangerous and defective sidewalk in a city must clearly show that the injury resulted from the defect complained of and that the municipal authorities either had actual knowledge of the defect or that it had existed for a sufficient time as to raise a presumption of knowledge. *City of Huntington v. Burke*, 12 Ind. App. 188 (89 N. E. Rep. 170).

DEDICATION.

EPITOME OF CASES.

Sec. 121. As to what constitutes a dedication. Whether a dedication for highway purposes has occurred in any instance is a conclusion of fact to be drawn from the circumstances of the particular case; and such circumstances must clearly show an unequivocal intention, manifested by appropriate words or conduct, or both, on the part of the owner, to devote his land to the wayfaring uses of that some-

what vague entity called "the public;" and the public must accept the proffered dedication, but such acceptance may be signified, and the dedication made perfect, by public user in accordance with the apparent offer of the owner. *Helm v. McClure*, 107 Cal. 199 (40 Pac. Rep. 487). While user may be sufficient to show an acceptance by the public of an offer to dedicate, it is not sufficient of itself to establish dedication by the owner, except it appear clearly that such user was with the knowledge and consent of the owner or without his objection and under such circumstances as to fairly give rise to the presumption that the owner intended to dedicate to such use. *Demartini v. City and Co. of San Francisco*, 107 Cal. 402 (40 Pac. Rep. 496). In Colorado it is held that where the owner of urban property who has laid it off into lots with streets, avenues and alleys intersecting the same, sells his lots with reference to a plat in which the same is so laid off, or, where there being a city map in which the same is so laid off, he adopts such map by sales with reference thereto, as between the grantors and purchasers of the lots there is a dedication to the public, but as to the city, such acts amount to a mere offer to dedicate. *John Mouat L. Co. v. Denver*, 21 Colo. 1 (40 Pac. Rep. 287). It is held that where one opens an alley through his land, fences the same and declares that it is for a public use and upon his application the authorities put it in order and keep it in repair there is a dedication and an acceptance for public use. *Dubois Cemetery Co. v. Griffin*, 165 Pa. St. 81 (30 Atl. Rep. 840). The supreme court of Wisconsin say: "Whether there was a dedication of the *locus in quo* to the public for a highway is purely a question of the intention of the owner of the lands, for dedication must rest on the clear intention of the owner of the lands to make such dedication. If the intent to dedicate is absent, there is no valid dedication. *Bushnell v. Scott*, 21 Wis. 451 (94 Am. Dec. 555); *Buchanan v. Curtis*, 25 Wis. 99 (3 Am. Rep. 23); *Cahill v. Layton*, 57 Wis. 600 (16 N. W. Rep. 1; 46 Am. Rep. 46); *Lawe v. Kaukauna*, 70 Wis. 806 (35 N. W. Rep. 561); *Irwin v. Dixon*, 9 How. 10; *City of Chicago v. Chicago, etc. Ry. Co.*, 152 Ill. 561 (38 N. E. Rep. 768); Elliott, Roads & S. 92. The intention to dedicate must be made to appear clearly. It may be made to appear by deed or parol, by words or by acts. But

it cannot be made to appear with sufficient certainty by either words or acts which are themselves equivocal or ambiguous. If by acts, they must be such acts as are inconsistent and irreconcilable with any construction except the assent of the owner to such dedication." *Cunningham v. Hendricks*, 89 Wis. 632 (62 N. W. Rep. 410). For cases which depend upon particular facts and illustrate what constitutes a dedication, see *Village of Benson v. St. Paul, M. & M. Ry. Co.*, 62 Minn. 198 (64 N. W. Rep. 893); *State v. St. Paul, M. & M. Ry. Co.*, 62 Minn. 450 (64 N. W. Rep. 1140); *Ritchie v. Kansas N. & D. Ry. Co.*, 55 Kan. 36 (39 Pac. Rep. 718); *City of Eureka v. Fay*, 107 Cal. 166 (40 Pac. Rep. 235); *Helm v. McClure*, 107 Cal. 199 (40 Pac. Rep. 437); *Burns v. Mayor, etc. of Liberty*, 131 Mo. 372 (33 S. W. Rep. 18).

Sec. 122. As to who may acquire by a dedication. A railroad company is not a public institution such as can acquire real estate by public dedication. *Louisville, St. Louis & T. Ry. Co. v. Stephens*, 96 Ky. 401 (29 S. W. Rep. 14; 49 Am. Stat. Rep. 303), citing, *Todd v. Railway Co.*, 19 O. St. 514. The same is held in *Lake Erie & W. R. Co. v. Whitham*, 155 Ill. 514 (40 N. E. Rep. 1014; 28 L. R. A. 612; 46 Am. St. Rep. 355), where the court say: "That there was evidence tending to show a common-law dedication to the railroad company, if such dedication is legally possible, cannot be doubted; and the question presented is whether the court decided correctly in holding that no such dedication can be effectual, as vesting a railroad company with the title or right of possession of the land attempted to be so dedicated to its use. It is doubtless true that any person who is the owner of land may, by virtue of his absolute dominion over it, donate or dedicate it to whomsoever he pleases. He may give it to the public, to a body corporate capable of holding it, or to a natural person, for such purposes, either public or private, as the donor sees fit to appoint. But to render such gift effectual the owner must grant or convey to the donee the land, or such interest therein as he wishes to donate, either by deed, or by some equivalent mode of conveyance known to the law. Except in what are known as 'common-law dedications,' parol gifts of land or of easements therein are ineffectual; it being

elementary law that the title to the lands cannot be transmitted *inter vivos* except by deed, or its equivalent, and that easements or other incorporeal hereditaments cannot be created by parol, but only by grant, or by prescription, whereby a conclusive presumption of a previous grant is raised. The provisions of chapter 109 of the Revised Statutes, entitled 'Plats,' furnish no exception to this rule. They merely create a new mode of conveyance. By force of those provisions the owner of land, by platting it, and marking or noting on the plat that portions of the land are donated or granted to the public, to a corporation, to a religious society, or to a natural person, in legal effect, conveys the portion of the land so marked or noted to the designated donee or grantee, for the uses and purposes therein indicated. By this statute the purposes for which an owner of land may dedicate or grant it away to others are not enlarged, restricted or modified, but a new mode is provided, by which his intention to grant or convey his land may be carried into effect. But, by the rules applicable to what is known as 'common-law dedications,' lands or easements therein may be dedicated to the public, so as to become effectually vested, without the aid of any conveyance. It may be done in writing, by parol, by acts *in pais*, or even by acquiescence in the use of the easement by the public. All that is necessary is that the intention to dedicate be properly and clearly manifested, and that there be an acceptance by or on behalf of the public. When that is done the right or easement becomes instantly vested in the public. But a dedication of this character, to be effectual, must be to the public. Washb. Easem. 205. At the common law they are confined to the purpose of highways, but in this country the doctrine has a wider application, and its limits have been judicially defined as extending to public squares, common lots, burying grounds, school lots and lots for school purposes, and pious and charitable uses generally, and in many cases where the use was either expressly, or from the necessity of the case, limited to a small portion of the public. 5 Am. & Eng. Enc. Law, 416, and authorities cited in notes. But we are referred to no decision, and we think none can be found, where a dedication of this character, made for any other purpose than one strictly public, has been sustained. Railroad companies, though engaged in the public employment

of common carriers, are essentially private corporations; and, while the lands composing their rights of way are acquired for a public purpose, the ownership of such lands, when acquired, is private. In no proper sense can such corporations be regarded as constituting the public or a portion of the public to which common-law dedications of land can be made. Donations or gifts of land can undoubtedly be made to them where the donor sees fit to effectuate his gift by some one of the ordinary modes of conveyance, and the donation can also be made by plat, where the donor sees fit to mark or note on his plat that the land which he wishes to give to such corporation is donated or granted to it. But we find no authority in the law for holding that a railroad corporation may acquire title to or an easement in land by common-law dedication. Neither the researches of counsel nor our own have brought to light a single case sustaining such dedication, and we think none can be found. Counsel seems to argue that because, under the statute, gifts or grants can be made to railroad companies and other corporations by plat, it should be held that common-law dedications may be made in like cases. This by no means follows. As we have already said, the statute makes the plat a mode of conveyance; thus enabling the donor of lands to accomplish by its means what, independently of the statute, he might have done by any other appropriate conveyance. But it in no way enlarges, either expressly or by implication, the class of cases where an easement may be created in favor of the public by common-law dedication. Moreover, the reasoning sought to be employed would prove too much. The statute makes the plat a conveyance, not only to the public and to the corporations, but also to natural persons; and the same principles of analogy which would extend the doctrine of common-law law dedications to railroad companies would make it apply as well to natural persons—a result for which, we think, no one will contend.” It is held that property cannot be dedicated to a corporation formed for scientific purposes whose membership is limited, on the ground that such a dedication is not for public use. *California A. of S. v. City and Co. of San Francisco*, 107 Cal. 334 (40 Pac. Rep. 426).

Sec. 123. Maps and plats. The making of a map designating certain portions of the land as avenues or streets and the making of conveyances by reference to such map of other land as bounded by such avenues and streets is held to amount to a dedication; but such dedication does not become effective as to the public until there has been an acceptance, and where there is no user of such streets and avenues by the public there must be proof of the acceptance by some formal action on the part of the authorities. *People v. Underhill*, 144 N. Y. 816 (89 N. E. Rep. 888). When a dedication to public use of certain spaces as streets is made by a public act duly recorded, the map or plat thereto annexed, and made a part thereof, becomes part of the authentic evidence of the dedication; and the spaces, measurements, and distances may be examined and used in connection with the act in determining the completeness and sufficiency of the dedication. *Armistead v. Vicksburg, S. & P. R. R.*, 47 La. 1881 (17 So. Rep. 888). Where a landowner makes a plat of his land into city lots, showing thereon a certain portion marked public grounds and marks a street extending from such grounds as Park Avenue, it amounts to a mere revocable dedication to the city for public purposes and the city is not precluded from claiming the land dedicated from the fact that it subsequently assessed the land for municipal taxes. *Evans v. Blankenship*, Ariz. (89 Pac. Rep. 812). Where a person surveys and plats his land into blocks, lots, streets and alleys, all the lines upon such plat represent the intent of the owner, and the meaning expressed by such lines should be deemed as effectual as that of the words or language found thereon. Where the owner of land draws and executes a plat thereof, and designates a strip thereon, by lines, as a street, and makes conveyances according to such plat, such strip is irrevocably dedicated to the public use as a street. *Great Northern Ry. Co. v. St. Paul*, 61 Minn. 1 (68 N. W. Rep. 96). Where the owners of platted lots convey the same with reference to a street as constituting the boundary, as between the grantor and grantees such street is dedicated even though not accepted as such by the public and the easement therein is a property right, the destruction or invasion of which constitutes a ground of relief in equity. The fact that the grantors at the time of making the conveyance were

using such platted street with the grantee's knowledge in a manner inconsistent with its public use, does not prevent such grantee from maintaining an action to enjoin its destruction. *Haight v. Littlefield*, 147 N. Y. 338 (41 N. E. Rep. 696). In Louisiana it is held that a deed of sale wherein three of the boundaries are given as certain well-recognized streets in the city of New Orleans, and the fourth is stated to be "the line of the Foucher property," and this property is delineated on a map or plan of the adjacent property, bearing an ancient date, and found among the public archives of the city, is a sale *per conversionem*. After being set apart for public use, and enjoyed as such, and private and individual rights acquired with reference to it, the law considers it in the nature of an estoppel *in pais*, precluding the original owner from denying such dedication. While a mere survey of land by the owner into town lots, defining streets, squares, etc., will not, without a sale, amount to a dedication, yet a sale of lots with reference to such a plat, when bounded by streets, will amount to an immediate and irrevocable dedication of the latter, binding on both the vendor and vendee. *Leland University v. New Orleans*, 47 La. 100 (16 So. Rep. 653).

Sec. 124. Acceptance by the public. As a general rule, in order to create a common law dedication of land for highway purposes there must be an acceptance by the public authorities. *Trine v. Pueblo*, 21 Colo. 102 (39 Pac. Rep. 330). The failure of a city for a long lapse of time to either use or improve streets and alleys which have been platted and the use of the same for private purposes, may be taken as a *prima facie* showing that the city did not intend to accept the dedication. *John Mouat L. Co. v. Denver*, 21 Colo. 1 (40 Pac. Rep. 237); *Demartini v. City and Co. of San Francisco*, 107 Cal. 402 (40 Pac. Rep. 496). An acceptance of a laid out street by a municipality is not rescinded or avoided by a subsequent refusal to pay the compensation awarded nor by a vote to discontinue the street. *Corey v. Inhabitants of Wrentham*, 164 Mass. 18 (41 N. E. Rep. 101). The owner of land can not, by executing a deed to the public conveying a right of way to a highway, compel the authorities to assume the burden of repairing it, unless the properly constituted agents of

the county or town accept it. The ordinary, but not the only method of signifying such acceptance is by working it in the usual way, as a public street, or the appointment of an overseer and the assignment of hands to work it by the county. The implication that the dedication is accepted may arise from other acts of dominion which show an unequivocal claim by the public to the benefits or the burdens incident to its full and complete enjoyment. If the offer to dedicate is recalled before it is acted upon by the public authorities, it cannot thereafter be accepted and there is no dedication. *State v. Fisher*, 117 N. C. 788 (28 S. E. Rep. 158).

Sec. 125. Distinction as between abutting owners and the public. In a recent case the supreme court of New Jersey say: "The general principle of law is clear that while the mere survey and the platting of lands into lots defining streets will not, without a sale, amount to a dedication, yet a sale of lots with reference to such platting, or by describing the lots as bounded by such streets, will, as between the grantor and grantee, amount to an irrevocable dedication of the streets. But, in order that the dedication be to the public use, it must not only have the assent of the owner of the soil, but there must either be a formal authorized acceptance on the part of the public authorities or else an actual enjoyment by the public of the use for such length of time that the public accommodation would be materially affected by a denial or interruption of the enjoyment. A proof, to the satisfaction of the court, of marking on a plat, accompanied by public use, sustains the right of dedication claimed by the public against the owner, or those claiming under him. 2 Dill. Mun. Corp., p. 744, § 631. These principles have been declared in many adjudications in this state. *Dummer v. Selectmen of Jersey City*, 20 N. J. L. 86; *Mayor etc. v. Morris C. & B. Co.*, 12 N. J. Eq. 547; *Trustees M. E. Church v. Mayor etc. of Hoboken*, 33 N. J. L. 13; *State v. City of Elizabeth*, 85 N. J. L. 859, affirmed 87 N. J. L. 432; *Hoboken L. & Imp. Co. v. Mayor etc. of Hoboken*, 36 N. J. L., 540; *Clark v. City of Elizabeth*, 40 N. J. L. 172; *Mayor etc. of Bayonne v. Ford*, 43 N. J. L. 292; *State v. Mayor etc. of Gloucester City*, Id. 546. But a dedication by the owner of

streets does not make them public streets or highways until the proper municipal authorities have accepted them as such, or in some way, by public user, ratified the dedication. *Pope v. Town of Union*, 18 N. J. Eq. 282; *Atty. Gen. v. Morris & E. R. Co.*, 19 N. J. Eq. 886, 891. While the fact of dedication may be clear as against the owner, or those claiming under him, yet there must exist on the part of the public a ratification or acceptance, evinced by some authorized formal municipal act or a public user. The public acquired no rights, nor is it subject to any burdens, by reason of the dedication, unless it be by some formal act of acceptance or by unequivocal public user. 2 Dill. Mun. Corp. (4th Ed.) 642, and cases cited in the note." *State v. Mayor etc. of South Amboy*, N. J. L. (80 Atl. Rep. 628).

In a recent case the supreme court of Georgia say: "Properly speaking, there can be no dedication to private uses, but only to the public use. However, if the owner of land lays out streets and alleys, and afterward sells lots bounding upon them, while this does not constitute them public streets, unless the public shall in some way accept and adopt them as such, yet the purchasers of these lots acquire the right to have the strips designated as streets remain open for their use as a perpetual easement over the ground for ingress to and egress from their property. Washb. Easm. (4th Ed.) 208, 204. The mere fact that the purchasers did not immediately begin to exercise their right to use the strip as a way, or that they delayed doing so for a number of years, would not occasion a loss of the easement. Their right to it being perfect and complete, they could not be deprived of it except by express abandonment, or by such conduct on their part as would be tantamount to the same. We do not, of course, mean to say that a right of this kind might not become stale by long lapse of time, or by nonuser under circumstances manifesting that the parties in interest had no intention ever to claim or use the right." *Ford v. Harris*, 95 Ga. 97 (22 S. E. Rep. 144).

In Delaware it is held that the recording of a plat of land with a roadway and the sale of lots in accordance therewith creates by implication a contract with the purchasers that the roadway will remain open for their benefit but that it does

not constitute a dedication of such road to the public. Under the statute, Rev. Code, chap. 60, which makes all roadways which have been used and maintained as such at the public charge for 20 years common highways, it is held that a roadway not dedicated by express grant does not become a highway until it has been used and maintained by the public for 20 years, there being no acts on the part of the owner amounting to an estoppel. *Fulton v. Dover*, 8 Houst. (Del.) 78 (81 Atl. Rep. 974).

Sec. 126. When dedication will be presumed from lapse of time. A dedication may be made by deed or other overt act, or may be presumed from the lapse of time or acquiescence of the party. There is no precise limit of time from which dedication may be presumed. In some cases it has been decided that twenty years was necessary to raise the presumption of dedication, while in others it has been held that a much shorter period was sufficient. If a dedication is sought to be established by a use which has continued a short time — not long enough to perfect the rights of the public under the rules of prescription — then, truly, the actual consent or acquiescence of the owner is an essential matter, since without it no dedication could be proved, and none would be presumed; but where this actual consent and acquiescence can be proved, then the length of time of the public use ceases to be of any importance, because, the offer to dedicate and the acceptance by use both being shown, the rights of the public have immediately vested. But where the claim of the public rests upon long continued adverse use, that use establishes against the owner the conclusive presumption of consent and so of dedication. It affords the conclusive and indisputable presumption of knowledge and acquiescence, while at the same time, it negatives the idea of a mere license. *Schwerdtle v. Placer Co.*, 108 Cal. 589 (41 Pac. Rep. 448).

Sec. 127. Making other use of dedicated property—Reservations. The mere appropriation by a municipal corporation to a particular public use of a part of its own public domain is not of itself such an irrevocable dedication to such particular use as will prevent a subsequent appropriation of the same property to such other public use as the interests of

the public may thereafter require. In order for such an appropriation of property to amount to an irrevocable public dedication, there must be, upon the public, such user under the first appropriation as that a change in use will operate as a serious injury or inconvenience to the general public. Practically a similar result would arise in favor of an individual citizen, where there had been such an investment by him, upon the faith and strength of the first appropriation as that a change of use would operate as a fraud upon him, and impair his rights of property thereunder vested. In the latter case, while as to him a dedication in its strict sense might not exist, an estoppel would arise in his favor, and bar the right of the municipal authorities, without compensation, to change the use. *Pettitt v. Mayor, etc. of Macon*, 95 Ga. 645 (28 S. E. Rep. 198). In Missouri it is held that a valid statutory dedication vests the fee in the public, and such dedication is not impaired by a reservation of the "trees and rocks" on the surface of the land. *Brown v. Carthage*, 128 Mo. 10 (30 S. W. Rep. 312).

DEEDS.

McCALL'S ADM'R v. HAMPTON ET AL.

(Ky.)

Conveyance of an expectancy by an heir—Equitable rights of the grantee. The conveyance of a mere possibility or expectancy of an heir in the estate of another, although for a valuable consideration, is void, and cannot be enforced in equity by the grantee.

PAYNTER, J.

Sec. 128. The case stated. The appellant—holding, by an assignment, a certain note against Wade Hampton—instituted this action, in which an attachment was obtained and levied on what was claimed to be his interest, as an heir at law, in certain lands in Boyd county, which belonged to his father, William Hampton, who died intestate on the 26th day of August, 1889. Charles H. Hampton, a brother of Wade Hampton, died on the 7th day of February, 1889. His per-

sonal representative presented his petition in the action, and was made a defendant therein. The allegations which it contains are substantially as follows, to-wit: That Wade Hampton was suffering from a cancer, and was without means to procure medical treatment for his malady; that his father had expressed a desire to sell part of his land, to aid him; that the father was then too infirm to make such disposition of his property; that in order that he might procure medical treatment, in consideration of \$800, Wade Hampton sold, and by deed conveyed to Charles H. Hampton, all right, title, and interest he then had, or might thereafter become entitled to, in the estate of his father, William Hampton, of whatsoever character; that by the deed he attempted to convey to him his whole interest as fully as if he was then seised and possessed of the same, the deed containing a covenant of general warranty. This deed was executed on the 27th of January, 1886—more than three years before the death of the father. To this pleading a demurrer was filed and overruled; and, appellant failing to plead further, the petition was dismissed, and the attachment discharged. The question raised by the demurrer, and which is to be determined, is, did Charles H. Hampton acquire the interest of Wade Hampton in his father's estate by virtue of the conveyance which he received for it?

Sec. 129. Conveyance of an expectancy by an heir. That a contingent interest is the subject of transfer and sale, there can be no doubt. A contingent estate which is to vest upon some future event, such as the owner's becoming of age, may become the subject of assignment or contract of sale. *Grayson v. Tyler's Adm'r*, 80 Ky. 363. The question in this case is whether a naked possibility or contingency, not founded upon a right or coupled with an interest, can be assigned or sold. Under the common law, this could not be done. There is no statute in this state changing the common law on this subject. When the contract was made, and the conveyance made to C. H. Hampton, Wade Hampton did not have any interest in his father's estate. The subject-matter of the contract was not *in esse* at the time of the contract. A contract of bargain and sale is invalid unless there is a thing or subject-matter to be contracted for. This is absolutely essential to the

validity of the contract. It has been said that, "if a son and heir bargain and sell the inheritance of his father, this is void, because he hath no right in himself." Co. Litt. 265; 2 Bac. Abr. tit. "Bargain and sale," p. 4. This question was fully considered in the case of *Wheeler's Ex'rs v. Wheeler*, 2 Metc. (Ky.) 474 (74 Am. Dec. 421). The court held that the son, who had executed a deed purporting to convey his interest in his father's estate (the father then being alive) to his brother, was, notwithstanding that fact, entitled to recover the interest in the estate which his deed purported to convey. It is conceded by counsel for appellee that it is essential to the legal validity of a contract that the thing sold must have an actual or potential existence, and that a mere possibility or contingency, not founded on a right or coupled with an interest, cannot be the subject of sale or assignment. Notwithstanding this is the common-law rule, it is insisted that the naked possibility or expectancy of an heir to his ancestor's estate may be the subject of a contract of sale, for a valuable consideration, and enforced in equity after the death of the ancestor. There was no claim in *Wheeler's Ex'rs v. Wheeler* that the sale was not in good faith, nor for a valuable consideration, still the court held the son was entitled to recover. In the case of *Alves v. Schlesinger*, 81 Ky. 290, the facts were substantially as they are in the case at bar. The conveyance was for a valuable consideration. After the death of the ancestor, a creditor of the heir who undertook to sell his interest in his ancestor's estate during the ancestor's lifetime sought to subject such interest to the payment of his debt. The party to whom the contract of sale had been given claimed the interest under the contract, and denied the creditor's right to subject it to payment of the debt. This court sustained the claim of the creditor. To recognize the contention of the counsel as being correct requires us to overrule *Wheeler's Ex'rs v. Wheeler* and *Alves v. Schlesinger*. Let us consider if this should be done. Every text writer and every court in this country, so far as we are aware, recognize the rule of the common law to be as we have stated it.

Sec. 130. Same — Equitable rights of grantee—
Authorities reviewed. Some text writers say, and some

courts have held, that a mere possibility or expectancy is assignable in equity, for a valuable consideration, and equity will enforce the contract when the possibility or expectancy has changed into a vested interest or possession. The explanation is, sometimes, that the assignment operates as a contract by the assignor to convey the legal estate or interest when it vests in him, and that equity will specifically enforce such contract, by decreeing a conveyance. *Lumber & Manuf'g Co. v. Marsh*, 91 Pa. St. 96, is cited by counsel for appellee, and the court assigned this as the reason for its decision, viz.: "Equity will support assignments of the contingent interests and expectancies—things which have no present, actual existence, but rest in mere possibilities; not, indeed, as a present, positive transfer, operating *in praesenti*, for that can only be a thing *in esse*, but as a present contract, to take effect and attach as soon as the thing comes *in esse*." This case is cited to sustain the text (Pom. Eq. Jur.) wherein it is stated that equity will enforce contracts of sale of bare possibilities and expectancies. In the note to the text it is said, "In my opinion, this theory of agreement is hardly adequate to explain the full doctrine." The learned author (Pom. Eq. Jur., close of note 1, § 1287), feeling that the courts which held that such contracts could be enforced in equity after the death of the ancestor were failing to give an adequate reason for their decisions, on the "theory of agreement," and that it would not do to admit that the right to the expectancy did not attach until the death of the ancestor, presented as the *rationale* of the equitable doctrine (§1271) that the assignee of the expectancy acquired at once a present, equitable right over the future proceeds of the expectancy, which was of such certain and fixed nature that it was sure to ripen into an ordinary equitable property right over those proceeds as soon as they came into existence by a transformation of the expectancy into an interest in possession; that there was an equitable ownership or property, in abeyance, to be changed to an absolute property upon the happening of the future event. The learned author was conscious of the fact that, when a court said that the assignee or vendee did not take a present interest in the thing contracted for, it was illogical that such interest would attach as soon as the thing came *in esse*. His conclusions were correct. But when he endeavors to give the correct theory upon which

the court of equity proceeded; he gives one more indefensible than the one which he criticises. He states a matter which does not exist in fact or law—that a bare possibility or expectancy is “sure to ripen into an ordinary equitable property right.” On the contrary, it is absolutely uncertain that it will ripen into a property right at all. Notwithstanding the thing is not *in esse*, the learned author says that there is acquired at once a present equitable right over the future proceeds of the expectancy. Here we have the assignee or vendee taking a present right in a thing not in existence, and in the proceeds of an expectancy which may never materialize. To reach his conclusion, he utterly disregards the legal significance of the words “naked possibility or expectancy.” They import a hope of succession, but not a certainty, as implied by the statement that they were sure to ripen into a property right. His premises are false, and conclusions erroneous. It is axiomatic that in every valid grant there must be a grantor, grantee, and a thing to be granted. When there is no subject-matter, nothing *in esse*, about which a contract can be made, the essential thing to the validity of a contract is absent; hence such contract is declared by the law to be void. If it be void, then no party to it can maintain an action upon it. A wise public policy produced the law which fixed the status of parties to such a contract. If it is wholesome to declare such contracts invalid, why should courts of equity enforce such contracts, in defiance of the law and a wise public policy? If this is to be the practice of courts of equity, then the common law on this subject is a dead letter, and inoperative. Why should the common law declare a contract invalid and void, if courts of equity have power to verify and enforce them? If this is to be the rule, why not declare the common law not in force on this subject? It seems to us to be a travesty upon common sense for the law to declare a contract void, and yet say that it is enforceable in a court of equity. Some courts hold that the expectancy of an heir to inherit his father's estate is not an interest capable of assignment in equity, any more than at law, and we agree with such courts upon the question. It seems, at this late day, it is needless to discuss the wisdom and policy of a law which has been sanctioned for so many generations, and we do not feel that we are called upon to defend it. A

strict adherence to it will save multiplying contentions, protect the improvident children and heirs at law from fraud and deceit—save free and untrammelled the actions of the possessor of estates in their distribution. If there were no other reason for adhering to the rule, to avoid the consequences to flow from its abrogation, those just suggested would be all-sufficient, in our opinion, for doing so. Judgment reversed, with directions to set aside the order overruling the demurrer, and for further proceedings consistent with this opinion.

Sec. 131. Conveyance of an heir's expectancy. The principal case is supported by *Wheeler's Exrs. v. Wheeler*, 2 Met. (Ky.) 474 (74 Am. Dec. 421); *Boynton v. Hubbard*, 7 Mass. 112. In a recent case the supreme court of Kansas holds that the contract of an expectant or presumptive heir by which he "releases, remises and forever quitclaims his undivided portion that he may be entitled to" of certain described real estate of his mother will be enforced in equity. *Olendening v. Wyatt*, 54 Kan. 523 (38 Pac. Rep. 792). The court say: "Courts of equity will uphold such an agreement of an heir apparent, where it is fairly made, and for an adequate consideration. If no unjust advantage is taken of the indiscretion or necessities of the heir, and if the agreement is not unconscionable, and is not obtained by fraud or oppression, it may be enforced in equity after the death of the ancestor. *Steele v. Frierson*, 85 Tenn. 430 (3 S. W. Rep. 649); Story's Eq. Jur., § 1040; Pom. Eq. Jur., §§ 1287, 1288; 1 Am. and Eng. Enc. Law, 830, and cases cited." In considering a similar conveyance the supreme court of Indiana holds that such a conveyance will not be enforced unless made with the knowledge and consent of the person from whom the inheritance is to come. *McClure v. Raben*, 125 Ind. 139 (25 N. E. Rep. 179; 9 L. R. A. 477); and this rule applies although the person whose consent is required is incurably insane. *McClure v. Raben*, 133 Ind. 507 (33 N. E. Rep. 275; 36 Am. St. Rep. 558). The court bases this holding upon the grounds of public policy, and in the first case cited says: "We regard such contracts and conveyances against public policy. The grantor at the time has no property or interest in the property of his father or ancestor which he can sell or convey, and none which the grantee can purchase. It is a mere gambling contract. It is wagering that the son or heir will survive the father or ancestor, and that the latter will not dispose of the property, and will die intestate, whereby the grantor will at some time in the future inherit an interest which he can then convey. It operates as a fraud upon the ancestor, and divests his bounty from the kin to a stranger. It encourages extravagance, prodigality, and vice on behalf of the heir, and in some instances might create an anxiety on the part of an avaricious or vicious purchaser for the death of the ancestor." Cal. Civ. Code, § 704, which provides that "a mere possibility, such as the expectancy of an heir apparent, is not to be deemed an interest of any kind," and § 1045 declaring that "a mere possibility not

coupled with an interest can not be transferred" are held not to invalidate a contract between an heir and his ancestor, made in good faith and for a valuable consideration, whereby the heir relinquishes all interest in the estate of such ancestor which might in the future vest in him. *In re Garcelon's Estate*, 104 Cal. 570 (38 Pac. Rep. 414; 43 Am. St. Rep. 134; 32 L. R. A. 595). A contract between an ancestor and his expectant heirs, all of full age, whereby they are to receive a present allowance by way of advancement in full for all their expectant interest in his estate and agree to release the estate of all claims, if made freely and without fraud, is binding. *Brown v. Brown*, 139 Ind. 653 (39 N. E. Rep. 152). Citing, *Gray v. Bailey*, 42 Ind. 349; *Bishop v. Davenport*, 58 Ill. 105; *Galbraith v. McLain*, 84 Ill. 379; *Kershaw v. Kershaw*, 102 Ill. 307; *Jones v. Jones*, 46 Iowa 466; *Smith v. Smith*, 59 Me. 214; *Trull v. Eastman*, 3 Metc. (Mass.) 121; Thornt. Gifts, 540, and authorities there cited. Where an heir apparent conveys his estate in expectancy, with the consent of his ancestor, and covenants in the deed that neither he nor those claiming under him will ever convey any right in such estate, this covenant, which amounts to a warranty, will bar him and those claiming under him, when the right descends. *Trull v. Eastman*, 3 Met. (Mass.) 121 (37 Am. Dec. 126, and notes, p. 128); *Curtis v. Curtis*, 40 Me. 24 (63 Am. Dec. 651). The deed of an heir apparent cannot operate to the prejudice of those who, upon his death prior to that of the ancestor, through him, become heirs of the latter in his stead. *Habig v. Dodge*, 127 Ind. 131 (25 N. E. Rep. 182). Citing, *Bobon v. Bobon*, 78 Ky. 408. The rule that a conveyance by an heir of his expectancy operates as an executory contract to convey which will be enforced in equity prevails in North Carolina. *Wright v. Brown*, 116 N. C. 26 (22 S. E. Rep. 313). Citing, *Mastin v. Marlow*, 65 N. C. 695; *Bodenhamer v. Welch*, 89 N. C. 78.

EPITOME OF CASES.

Sec. 132. As to what constitutes a conveyance. Under a statute providing that "any instrument in writing signed by the grantor, or his agent having a written authority, is effectual to transfer the legal title to the grantee, if such was the intention of the grantor, to be collected from the entire instrument," it is held that the following indorsement on a deed "I assign the within title of land unto * * *, from me and my heirs forever," constitutes a conveyance. *Wisdom v. Reeves*, Ala. (18 So. Rep. 13). A certificate of sale of school land made by a commissioner of the state land office is held to be a "conveyance" within the mean-

ing of the statute prohibiting resulting trusts. *Haaven v. Hoaas*, 62 Minn. 818 (62 N. W. Rep. 110).

Sec. 183. Deeds and wills distinguished. In the recent case of *Stroup v. Stroup*, 140 Ind. 179 (89 N. E. Rep. 864; 27 L. R. A. 528), the supreme court of Indiana say: "An instrument, having otherwise the formalities of a deed, will be construed to operate as a deed whenever it appears therefrom that it was the intent of the maker to convey any estate or interest whatever, to vest upon the execution of the paper. If, however, it appears that all the estate which it was the purpose to convey was reserved to the grantor during his life, and the deed was only to take effect upon the death of the grantor, it will be construed to be testamentary in its character. *Spencer v. Robbins*, 106 Ind. 580 (5 N. E. Rep. 726); *Wall v. Wall*, 80 Miss. 91 (19 Cent. Law J. 46; 64 Am. Dec. 147); *Leaver v. Gauss*, 62 Iowa 814 (17 N. W. Rep. 522); *Turner v. Scott*, 51 Pa. St. 126. In 19 Cent. Law J. 46, will be found an extended collection of the cases upon the subject of deeds of a testamentary character; and there as in the cases cited, it is clearly and firmly settled that the pivotal question is the intention of the grantor. If to postpone title and enjoyment until after his death, it is testamentary; if to confer title and to postpone the enjoyment thereof, it is a deed." A deed, otherwise in the form of a statutory warranty deed, is not rendered testamentary in its character by a provision therein that it is not to take effect until the death of the grantors, but conveys a present interest to the grantee, the full enjoyment of which is postponed until the death of both of the grantors. *Wilson v. Carrico*, 140 Ind. 533 (40 N. E. Rep. 50; 49 Am. St. 218). See opinion for extensive collation of authorities on this subject. To the same effect is the case of *Goff v. Davenport*, 96 Ga. 423 (23 S. E. Rep. 395). An instrument executed by a father to his children and delivered to them, in the form of an absolute deed, containing the clause, "provided always, and it is expressly understood and agreed, that this conveyance is not to take effect till after my death, and that, at my death, the title to the foregoing lands are to vest immediately in my said children," was construed not to be a will but a deed reserving to the grantor a life estate.

Abney v. Moore, 106 Ala. 131 (18 So. Rep. 60). Particular instrument construed and held to be a deed and not a will. *Kaufman v. Ehrlich*, 94 Ga. 159 (21 S. E. Rep. 377); *Goff v. Davenport*, 96 Ga. 423 (23 S. E. Rep. 395).

Sec. 134. Use of seal. A statute (Ala. Code, § 2674) dispensing with the necessity of a seal does not have retroactive effect. *Wisdom v. Reeves*, Ala. (18 So. Rep. 13). A deed, which has a scroll annexed to the grantor's signature, with the word "seal" written in it although such scroll is not recognized as a seal in the body of the instrument, will be held to be a deed, where the instrument has been duly acknowledged for the purpose of having it recorded. *Cosner v. McCrum*, 40 W. Va. 389 (21 S. E. Rep. 789).

In construing Wag. Mo. Stat., Vol. 1, p. 269, § 5, which provides that "every instrument of writing, expressed on the face thereof to be sealed, and to which the person executing the same shall affix a scrawl by way of seal, shall be deemed and adjudged to be sealed," and Rev. Stat. 1879, § 671, which requires a deed executed by a commissioner to convey county lands to be "under his proper hand and seal," it is held under the statute first mentioned that a common law seal is sufficient, in the absence of the statutory scrawl; and that a conveyance executed by a commissioner under the last named statute under the seal of the county court, impressed on paper and attached to the deed is sufficient. *Alt v. Stoker*, 127 Mo. 466 (30 S. W. Rep. 132). The court say: "The sole question, then, is whether the deed was properly signed and sealed by the commissioner, so as to make it effective to pass the title from the county. There was no statutory scrawl, by way of seal, but a common-law seal would be sufficient. *Pease v. Lawson*, 33 Mo. 39. One or the other was requisite to make the conveyance effective. One of the definitions of a 'seal' is 'an impression upon a wax, wafer, or some other tenacious substance, capable of being impressed.' In later years, the courts, to effectuate the intention of due execution, have been liberal in respect to the nature of the substance and the character of the impression necessary to constitute a seal. So it has been held, in this state, that a piece of colored paper affixed as a seal to an instrument by mucilage is a good seal,

though no impression upon it is discernable. *Pease v. Lawson*, 33 Mo. 39. It is the seal which authenticates, and not the substance on which it is impressed; but, where the courts can recognize its identity, they should not be called upon to analyze the material which exhibits it. *Pollow v. Roberts*, 13 How. 473 (14 L. Ed. 228). The statute making a mere scrawl sufficient requires also a recital on the face of the instrument that is sealed. So instruments without such recital have been held not to be valid deeds, though the statutory scrawl was attached. *Cartmill v. Hopkins*, 2 Mo. 220; *Grimsley v. Riley*, 5 Mo. 280 (32 Am. Dec. 319); *Walker v. Keile*, 8 Mo. 301. Where there is a real seal, the requirement as to recital does not obtain. In such case, 'the fact, and not the assertion, fixes the nature of the instrument.' *Tayler v. Glaser*, 2 Serg. & R. 502; *Dingee v. Kearney*, 2 Mo. App. 525. A seal of one of several signers of an instrument may be adopted as the seal of the others, though the only seal used is that of the statutory scrawl, and, when the instrument purports on its face to be sealed by each, an adoption will be presumed. *Lunsford v. Lead Co.*, 54 Mo. 486. As no particular impression is required, we think there could be no doubt that the seal of the county court, impressed upon paper attached to the instrument, if adopted as the seal of the commissioner, would be a sufficient sealing, in the contemplation of the statute, which required the deed to be 'under his proper hand and seal.' "

Sec. 135. Grantor and grantee. A deed executed to a person who is dead is void. *Diamond v. Turner*, 11 Wash. St. 189 (39 Pac. Rep. 379); *McInerney v. Beck*, 10 Wash. St. 515 (39 Pac. Rep. 130). Where it is a case of *idem sonans* the identity of the grantee may be fixed by extrinsic evidence. *Doty v. Doty*, 159 Ill. 46 (42 N. E. Rep. 174) See Ballards' Annual, Vol. 1, §§ 55, 56.

Sec. 136. Delivery of deeds. Title does not pass until delivery. *Paddock v. Potter*, 67 Vt. 360 (31 Atl. Rep. 784); *Missouri R. L. Co. v. Finance Co.*, Ia. (61 N. W. Rep. 918). To constitute delivery of a deed, it must clearly appear that it was the intention of the grantor that the deed should pass the title at the time, and that he should lose

all control over it. *Wilson v. Wilson*, 158 Ill. 567 (41 N. E. Rep. 1007; 49 Am. St. Rep. 176). The delivery must be during the life of the grantor. No delivery can be said to have been made of a deed found in the possession of the grantor at the time of his death, accompanied by a letter requesting that it be given to the person named as grantee, after the death of the grantor, without other evidence bearing upon the fact of delivery; and the grantee can take nothing under, and is not entitled to possession of, such undelivered instrument. *Lawn v. Donovan*, 2 Kan. App. 404 (42 Pac. Rep. 744). No title passes to the grantee where he gets possession of the deed without the knowledge or consent of his grantor. *Foley v. McNamara*, Ia. (62 N. W. Rep. 26). One asserting the delivery of a deed to him has the burden of proving it. *Fourdan v. Patterson*, 102 Mich. 602 (61 N. W. Rep. 64). Possession of a deed by the grantee therein creates a presumption of its delivery to him, but this presumption may be overcome. *Foley v. McNamara*, Ia. (62 N. W. Rep. 26). This presumption is not affected by the fact that the grantee does not record the deed and permits the grantor to remain in possession. *Magee v. Allison*, Ia.

(63 N. W. Rep. 322). A delivery to the husband of a deed executed to him and his wife jointly inures to her benefit although not recorded until after his death. *Tyler's Estate v. Tyler*, Ind. App. (41 N. E. Rep. 965). The fact that a deed is acknowledged is not proof of delivery, but a circumstance tending to show delivery. *Ferguson v. Bond*, 39 W. Va. 561 (20 S. E. Rep. 591). Particular facts held sufficient to show a delivery. *Kaufman v. Ehrlich*, 94 Ga. 159 (21 S. E. Rep. 877); *Saffold v. Horne*, 72 Miss. 470 (18 So. Rep. 433). Particular facts held insufficient to show a delivery. *Foley v. McNamara*, Ia. (62 N. W. Rep. 26); *Baker v. Updike*, 155 Ill. 54 (39 N. E. Rep. 587).

Sec. 137. Delivery by recording. In Illinois it is held that the mere acknowledgment and recording of a deed to an adult grantee without his knowledge or consent does not amount to a delivery. *Sullivan v. Eddy*, 154 Ill. 199 (40 N. E. Rep. 482). Where a mother who conveyed land to her son taking from him a mortgage and notes to be paid to her

heirs after her death, placed such mortgage on record, it was held a sufficient delivery to the beneficiaries to entitle them to maintain an action thereon. *Brunson v. Henry*, 140 Ind. 455 (39 N. E. Rep. 256). The presumption of delivery arising from the registry of a deed which is a benefit to the grantee is not rebutted by proof of the grantor's subsequent possession of the deed and his declarations denying the delivery. *Helms v. Austin*, 116 N. C. 751 (21 S. E. Rep. 558).

Sec. 138. Delivery to third persons. A delivery to a third person, with instructions to deliver to the grantee upon the grantor's death, is a valid delivery. *Dinwiddie v. Smith*, 141 Ind. 318 (40 N. E. Rep. 748); *Wittenbrock v. Cass*, 110 Cal. 1 (42 Pac. Rep. 800); and a delivery made accordingly relates back to the date of the execution of the deed. *Gish v. Brown*, 171 Pa. 479 (88 Atl. Rep. 60). A mortgage duly executed and delivered to a third person to be recorded, with the assent of the mortgagee, was held to be delivered. *Knapstein v. Tennette*, 156 Ill. 322 (40 N. E. Rep. 947). It is held that where a grantor signed and acknowledged the execution of a deed and left it with a broker who was negotiating a sale of the land with instructions not to deliver it without the grantor's consent and the broker delivered the deed without such consent, and the grantee without having taken possession of the land sold it to an innocent purchaser, no title passed because there was no delivery of the first deed. *Allen v. Ayer*, 26 Ore. 589 (39 Pac. Rep. 1).

Where one executed a deed to his brother's children, some of whom were minors, and gave the same to his business partner, instructing him to take care of it, and at the same time executed a lease in which the grantees in the deed were recognized as owners, the deed was held delivered. *Miller v. Meers*, 155 Ill. 284 (40 N. E. Rep. 577). The court say: "Anything which clearly manifests the intention of the grantor and the person to whom it is delivered that the deed shall presently become operative and effectual, that the grantor loses all control over it, and that by it the grantee is to become possessed of the estate, constitutes a sufficient delivery. The very essence of the delivery is the intention of the party." *Bryan v. Wash*, 2 Gilman, 557; *Cline v. Jones*, 111 Ill. 568, and

cases there cited. It is well settled that the law makes stronger presumptions in favor of the delivery of deeds in cases of voluntary settlements, especially in favor of infants, than in ordinary cases of bargain and sale. The acceptance by the infant will be presumed. And it is even held that an instrument may be good as a voluntary settlement, though it be retained by the grantor in his possession until his death, providing the attending circumstances do not denote an intention contrary to that appearing upon the face of the deed. *Bryan v. Wash*, 2 Gilman, 557; and *Cline v. Jones*, 111 Ill. 563; *Reed v. Douthit*, 62 Ill. 348; *Walker v. Walker*, 42 Ill. 811; *Otis v. Beckwith*, 49 Ill. 121; *Masterson v. Cheek*, 23 Ill. 72; *Souverbye v. Arden*, 1 Johns. Ch. 242; *Bunn v. Winthrop*, Id. 329; *Scrugham v. Wood*, 15 Wend. 545 (80 Am. Dec. 75); *Perry, Trust*, § 103; *Urann v. Coates*, 109 Mass. 581; *Thompkins v. Wheeler*, 16 Pet. 114 (10 L. Ed. 908). And it was said in *Walker v. Christen*, 121 Ill. 97 (11 N. E. Rep. 898), that 'the crucial test, in all cases, is the intent with which the act or acts relied on as the equivalent or substitute for actual delivery were done.'"

Sec. 139. Delivery in escrow. A delivery in escrow cannot be made to the grantee himself. *Magee v. Allison*, Ia. (63 N. W. Rep. 822). A grantee of a deed deposited in escrow who fraudulently obtains possession thereof without the performance of the conditions acquires no title and passes none to a *bona fide* purchaser from him. *Jackson v. Lynn*, Ia. (62 N. W. Rep. 704); but one who has performed the conditions of the escrow may have specific performance of the contract. *Bowman v. Gork*, Mich. (63 N. W. Rep. 998). It is held that the tender of a deed on trial of a cause, which is placed under the control of a court, duly executed, constitutes a good delivery in escrow which is not defeated by the subsequent death of one of the grantors. *Webster v. Kings Co. Trust Co.*, 145 N. Y. 275 (89 N. E. Rep. 964).

Sec. 140. Date of delivery. Until another date of delivery is proven, the presumption as to date is that the delivery was on the date of the deed. *Ferguson v. Bond*, 39 W. Va. 561 (20 S. E. Rep. 591). Citing, *Harvey v. Alexander*,

1 Rand. (Va.) 219, 241 (10 Am. Dec. 519); *Harman v. Oberdorfer*, 88 Grat. 497; 2 Greenl. Ev. § 297. This presumption prevails although the date of the acknowledgment is subsequent to the date of the deed. *Lake Erie & W. R. Co. v. Whitham*, 155 Ill. 514 (40 N. E. Rep. 1014; 46 Am. St. Rep. 855; 28 L. R. A. 612); *Smith v. Scarborough*, 61 Ark. 104 (32 S. W. Rep. 882). In the last case the court say: "The rule is well established that, where a document purporting to be a duly-acknowledged deed, with regular evidence of its execution upon its face, is found in the hands of the grantee, or if such a deed is found upon the proper records, a presumption arises that it was delivered at the time it bears date, or at some time prior to the date of its acknowledgment." Citing, *Scobey v. Walker*, 114 Ind. 254 (15 N. E. Rep. 674); *Vaughan v. Godman*, 94 Ind. 191; *Wheeler v. Single*, 62 Wis. 880 (22 N. W. Rep. 569); *Wallace v. Burdell*, 97 N. Y. 18; *People v. Snyder*, 41 N. Y. 897; *Trustees v. McKechine*, 90 N. Y. 618; *McCurdy's Appeal*, 65 Pa. St. 290. The presumption that a deed was delivered at or about the day of its date and acknowledgment is rebutted by the execution and delivery of a similar deed several years later. *Flynn v. Flynn*. N. J. Eq. (81 Atl. Rep. 80). In construing Cal. Civ. Code, § 1055, providing that "a grant duly executed is presumed to have been delivered at its date," it is held that the presumption declared by this statute is not overcome by the fact that the deed was not acknowledged until six months after its execution. *Gordon v. San Diego*, 108 Cal. 264 (41 Pac. Rep. 801).

Sec. 141. Acceptance of deeds. Acceptance is necessary to the complete execution of a deed. *Green v. Casey*, Ky. (80 S. W. Rep. 5). A deed of assignment being for the benefit of creditors, the law will presume an acceptance upon their part, until the contrary is made to appear, and, *prima facie*, the trustee is also presumed to have accepted. *Ewing v. Walker*, 60 Ark. 508 (31 S. W. Rep. 45). Citing, 2 Pom. Eq. Jur. § 1007; Tied. Eq. Jur. § 814; *Wilt v. Franklin*, 1 Bin. 502 (2 Am. Dec. 474); *Ammon v. Martin*, 59 Ark. 191 (26 S. W. Rep. 826). See, also, *Breathwit v. Bank*, 60 Ark. 26 (28 S. W. Rep. 511).

Sec. 142. Surrender and cancellation of deeds.

Where a conveyance of a tract of land is executed and delivered, the subsequent destruction or surrender of the deed will not revest the title to the land in the grantor. *Gillespie v. Gillespie*, 159 Ill. 84 (42 N. E. Rep. 805); and this is true although the surrender or destruction is by the consent of both parties. *Ferguson v. Bond*, 39 W. Va. 561 (20 S. E. Rep. 591). A different rule is held to apply if the grantee, in surrendering up the deed, does so with the intention or with the request that it be destroyed, for the purpose of divesting the title in the grantee, as in that case the grantor again acquires the equitable title. *Gillespie v. Gillespie*, 159 Ill. 84 (42 N. E. Rep. 805). The redelivery of an unrecorded deed for a valuable consideration paid by the grantor will invest him with an equitable title which he may assert. *Happ v. Happ*, 156 Ill. 183 (41 N. E. Rep. 39). A return of a mortgage by the mortgagee to the mortgagor for safe keeping, after there has been a complete delivery does not defeat the delivery. *Bradtfeldt v. Cooke*, 27 Ore. 194 (40 Pac. Rep. 1; 50 Am. St. Rep. 701).

Sec. 143. Construction of deeds. A deed will be construed most strongly against the grantor. *Prettyman v. Conaway*, 9 Houst. (Del.) 221 (32 Atl. Rep. 15); *Helms v. Austin*, 116 N. C. 751 (21 S. E. Rep. 556). Where an *habendum* clause is repugnant to the estate already vested by a deed it is void. *Foreman v. Presbyterian Ass'n.* Md. (30 Atl. Rep. 1114). Under Ga. Code § 2697, "if two clauses in a deed be utterly inconsistent, the former must prevail; but the intention of the parties, from the whole instrument, should, if possible, be ascertained and carried into effect." *Bray v. McGinty*, 94 Ga. 192 (21 S. E. Rep. 284). The word "heirs" may be construed to mean "children," and *vice versa*, whenever the context requires it, to give meaning and effect to all parts of the instrument. *Fanning v. Doan*, 128 Mo. 323 (30 S. W. Rep. 1032). Where a father and son have the same name, and a conveyance of land is made, leaving it uncertain on the face of the deed whether the grant is to the father or the son, the law will presume that the father was intended as the grantee; but this presumption may be rebutted. *Doty v. Doty*,

159 Ill. 46 (42 N. E. Rep. 174). In construing a conveyance of real estate containing repugnant calls for the purpose of determining the location of the land granted, the descriptive courses will be varied to make them conform to the monuments fixed by the terms of the conveyance as boundary or locative calls. *Abbey v. McPherson*, 1 Kan. App. 177 (41 Pac. Rep. 978). Where a deed conveying land has a doubtful construction as to the boundaries, the construction given by the parties themselves as shown by their acts and admissions is deemed to be the true one unless the contrary be clearly shown. *Illinois Cent. R. Co. v. O'Connor*, 154 Ill. 550 (89 N. E. Rep. 563). Where the consideration of a deed is the life support of the grantor by the grantee which is provided for in a written instrument executed contemporaneously with the deed they should both be read together in construing the deed. *Norton's Adm'r v. Perkin's*, 67 Vt. 208 (81 Atl. Rep. 148). Where a conveyance is executed in place of a former conveyance between the same parties and to effect the same purpose the second deed is evidence to show the construction placed upon the first deed by the parties thereto. *Ringrose v. Ringrose*, 170 Pa. 598 (88 Atl. Rep. 129). For construction of conveyance of right of way, see Right of way.

Sec. 145. Construction of particular deeds. Where, in describing property lying south of an alley, in a conveyance of the whole of it, the alley is referred to as being laid out for the accommodation of the lots "on the south side of the said alley," and in the same conveyance the right to use the alley is given in the following language, "together with the free and common use and privilege of the aforesaid 8 feet wide alley, and of a water course therein," such right to use is not exclusive as against a subsequent grantee of the lot lying on the north thereof. *Haas v. Bergen*, 167 Pa. 408 (81 Atl. Rep. 652). Where a deed for the exchange of real estate recited that R., one of the parties, owned a certain lot, and that the other parties (H. and his wife) owned another lot; that H. and his wife, in consideration of R.'s lot and \$700, deeded their lot to R., and R. granted his lot without naming any grantee, it was held that the title to the lot formerly owned by R. was vested in H. and his wife jointly,

although the title to the lot given by them in exchange stood in H. alone. *Lagoria v. Dozier*, 91 Va. 492 (22 S. E. Rep. 289). These words in a deed, viz.: "Also, the right of flowing the Great pond," were held to mean a grant of uses suited to the existing conditions at the time the grant was made—flowage incident to the maintenance of the then existing dam when repaired, made secure and tight. *Bennett v. Kennebec Fiber Co.*, 87 Me. 162 (82 Atl. Rep. 800). The grant of the "south 26 feet more or less" of a lot with "the undivided one-half of the wall on the north side of the above described premises" is held to convey only an easement in the wall. *Duncan v. Rodecker*, 90 Wis. 1 (62 N. W. Rep. 533). Where there is a conveyance to A. and his children, if A. have children at the time of the conveyance, the children take jointly with the parent and after-born children are excluded. *Moore v. Lee*, 105 Ala. 435 (17 So. Rep. 15).

Sec. 146. Recitals in deeds. Although a deed executed by a husband and wife recites that the consideration was "to them in hand paid," he may show that he received no part thereof where such fact becomes material in determining his liability on the covenants in such deed. Haight and Finch, J.J., dissenting. *Mygatt v. Coe*, 147 N. Y. 456 (42 N. E. Rep. 17). Recitals in a deed to the effect that a party thereto has succeeded to the rights of another party previously holding the title are not of themselves conclusive evidence of that fact. *Hanna v. Chase*, 4 N. Dak. 851 (61 N. W. Rep. 18; 50 Am. St. Rep. 656). A recital in a deed to the effect that the grantors are heirs of the previous owner and convey as such is not conclusive, and does not dispense with proof of their identity. *Wolf v. Holton*, 104 Mich. 107 (62 N. W. Rep. 174). Recitals in the deed of an auctioneer made in pursuance of a sale authorized by a mortgage, as to the advertisement and manner of sale, will be taken as *prima facie* evidence of the truth of the facts stated. *Naugher v. Sparks*, Ala. (18 So. Rep. 45).

Sec. 147. Restrictions upon alienation. The condition or limitation, which is designed to restrain altogether alienation of land, imposed in a deed by which the land is granted in fee, is repugnant to the nature of the estate granted,

and is void. *Mutual Ben. L. Ins. Co. v. Rector etc. Grace Church*, 53 N. J. Eq. 418 (32 Atl. Rep. 691); *Baulden v. Miller*, 87 Tex. 859 (28 S. W. Rep. 940). In the recent case of *Postal Tel. Cable v. Western U. Tel. Co.*, 155 Ill. 835 (40 N. E. Rep. 587), the supreme court of Illinois say: "Restrictions on the power of alienation have long been unfavored, and the policy of this state has ever been hostile to them, and this principle is firmly ingrafted on our polity that such covenants will be construed with the utmost strictness, and with a zealous regard for the prevention of the restraint from going beyond the express stipulation; and all doubts, as a general rule, must be resolved in favor of a free use of property, and against restrictions. This principle has come to be the settled rule of most of the states, as it is also of England. *Hutchinson v. Ulrich*, 145 Ill. 842 (34 N. E. Rep. 556; 21 L. R. A. 891); *Eckhart v. Irons*, 128 Ill. 568 (20 N. E. Rep. 687); *Boyd v. Association*, 16 Ill. App. 574; *Livingston v. Stickles*, 7 Hill. 253; *Brugman v. Noyes*, 6 Wis. 1; *Crusoe v. Bugby*, 2 W. Bl. 766; 1 Washb. Real Prop. 8, 7; Tayl. Landl. & Ten. § 402; 4 Kent. Comm. 181."

Sec. 148. Restrictions as to use of property. A stipulation in a deed that a certain kind of house should be erected on the premises, and would be placed at a certain distance from the street, with reversion to the grantor, his heirs and assigns, in case of breach, constitutes an incumbrance, and not merely an easement in favor of the grantor's residence, which lay across the street. *Locke v. Hale*, 165 Mass. 20 (42 N. E. Rep. 331). An unenclosed roofed porch, built on a brick foundation and permanently attached to the front of the house, is within a restriction in a deed which provides that "all buildings upon the said lots shall be erected not less than fifteen feet back from the fence line." *Ogontz Land & Imp. Co. v. Johnson*, 168 Pa. 178 (31 Atl. Rep. 1008). Substantially the same is held in *Reardon v. Murphy*, 168 Mass. 501 (40 N. E. Rep. 854). The court say: "*In Attorney General v. Gardiner*, 117 Mass. 492, a structure three feet high, erected within a restricted space for coal bins, while considered no part of the defendant's house, was held to be of itself a building. The same has been held as to a pavilion. *Buck*

v. Adams, 45 N. J. Eq. 552 (17 Atl. Rep. 961). See, also, *Blackmore v. Stanley*, 159 Mass. 6 (33 N. E. Rep. 689). Bay windows are undoubtedly part of a house, and cannot extend over restricted ground. *Sanborn v. Rice*, 129 Mass. 387, 395; *Payson v. Burnham*, 141 Mass. 547 (6 N. E. Rep. 708); *Manners v. Johnson*, 1 Ch. Div. 678." In administering relief in cases growing out of restrictions in deeds upon the use of the property, courts will be governed by equitable principles. Although a grantor in conveying real estate may impose certain restrictions upon its use, provided they do not deprive the owner of the beneficial use of the property, courts will always favor a liberal interpretation of the language of such restrictions in order to impose as few difficulties as possible in the free use and disposal of the particular estate conveyed. If the words are doubtful they will be resolved in favor of keeping the restriction within the narrowest limits. *Peabody Heights Co. v. Willson*, 82 Md. 186 (32 Atl. Rep. 886).

Sec. 149. Reservations and exceptions. A reservation or charge upon land, in a conveyance, for maintenance for life, is valid, though no amount be fixed. *Bates v. Swiger*, 40 W. Va. 420 (21 S. E. Rep. 374). A deed "reserving a strip two rods wide off from the north and west side of said premises for a street," was held to pass title to the entire tract, subject only to an easement in the strip mentioned. *Sullivan v. Eddy*, 154 Ill. 199 (40 N. E. Rep. 482). Where a reservation has been made in a deed subsequent purchasers from the parties thereto hold subject to the provisions of such reservation. *Palfrey v. Foster*, 47 La. 939 (17 So. Rep. 425). Under a reservation which provided that the "grantor herein reserves, however, all the rents, issues, and profits arising from said premises during the lifetime of him, the said grantor, and also the privilege and right to dispose of said premises by deed, during his lifetime," it was held that such grantor could bequeath to another the use of the land, and the rents and profits of the same, for a period of time extending two years after his death. *Lacy v. Comstock*, 55 Kan. 86 (39 Pac. Rep. 1024).

The words "reserve" and "reserving," and "except" and

“excepting,” in deeds, are often used interchangeably, and it is oftentimes difficult to determine which was intended, except by a reference to the subject matter and the surrounding circumstances. The following language appeared in deeds from a grantor to his grantees, viz: “Reserving, however, the right of erecting a log sluice and flume between my mill and the mills of said grantees, and of planking against their said mill to form one side of said log sluice and flume.” “Also excepting and reserving the right of running logs through the premises from the river, and of erecting and maintaining a log sluice from the mill pond, parallel and contiguous to the said granted mill and the said Treat’s Mill, about 5 feet in width, on the east side of said granted mill.” *Held*, that this language, taken in connection with the facts and circumstances surrounding the case, constituted an exception rather than a reservation; that it was not a mere personal right, or easement in gross, but an interest retained in the grantor which he could legally convey, and which was good without words of inheritance being mentioned in the exception. It was a right inheritable and transferable, and not one limited to a lifetime. It is also held that where upon the destruction of the mill by fire it was found “necessary” to lay the foundation ten feet wider than the original sluice in order to support the sluice of the width mentioned in the deeds, the owner of the exception could not be held guilty of trespass on account of the erection of such foundation. *Ring v. Walker*, 87 Me. 550 (38 Atl. Rep. 174).

Sec. 150. Reservation of right of way. Where one reserves a right of way in land conveyed his grantee takes the fee and may make any use of the land which does not interfere with the use of the way. *Moffit v. Lytle*, 165 Pa. St. 173 (30 Atl. Rep. 922). The court quotes approvingly from the case of *Kister v. Reeser*, 98 Pa. St. 1 (42 Am. Rep. 608), as follows: “Where land is granted, and the right of way reserved, that right becomes a new thing derived from the land; and although, before the deed, the grantor had the right of way over the land whenever he chose to exercise it, yet when he conveyed the land the reservation was a thing separate from the right of the grantee in the land. *State v. Wilson*, 42 Me. 9. A reservation is the creation of a right or interest

which had no prior existence as such in a thing or part of a thing granted. It is distinguished from an exception in that it is of a new right or interest. An exception is always of part of the thing granted; it is of the whole of the part excepted." Construction of particular reservation of right of way. *Gleason v. Burroughs*, 90 Wis. 816 (68 N. W. Rep. 292).

Sec. 151. Reservation of right to possession. Where a grantor conveyed land upon which there was a brick yard in operation, reserving the right of possession to the entire tract for one year, except a right of way, he was held entitled to the use and enjoyment of the whole thereof including the right to make brick and dig clay from an opened pit. *Waldorf v. Elkhart & W. R. Co.*, 13 Ind. App. 134 (41 N. E. Rep. 896). The court say: "It is settled law that tenants for life or years are entitled to work mines, quarries, clay pits, or gravel beds which have been opened and used before the time of the commencement of the particular estate. *Reed v. Reed*, 16 N. J. Eq. 248; *Findlay v. Smith*, 6 Munf. 134 (8 Am. Dec. 733); *Neel v. Neel*, 19 Pa. St. 323; *Lynn's Appeal*, 31 Pa. St. 44; 1 Wood, Landlord and Tenant, p. 188, § 53; 1 Washb. Real Prop. 111, 314; Co. Litt. 546. This rule is founded upon the principle that the holder is entitled to use and enjoy the land according to the previous and accustomed method. The opening of new mines would be waste, but the working of the old ones is a simple continuation of the use of the land made by the owner. In *Allen v. Scott*, 21 Pick. 25 (32 Am. Dec. 238), it was held that where a deed conveyed a tract of land and the buildings thereon, 'except the brick factory,' the reservation included the right to occupy the land on which it stood, and the water privilege necessary to the carrying on of the factory. In *Russell v. Bark*, 47 Minn. 286 (50 N. W. Rep. 228; 28 Am. St. Rep. 368), it is decided that where a brick factory had been erected upon lands owned by tenants in common, and the business lawfully undertaken, the grantee of an owner of an undivided interest was not authorized to prevent its continuation by the cotenant. In this case it was clearly the intention of the parties, as expressed in the deed, that the grantor was to have, not only the naked possession, but the use and enjoyment, of the land; and that certainly included the right to use it for a brickyard, and to dig the clay from the

opened pit, these being essential to the use of that portion of the land for the only purpose for which it was fitted."

Sec. 152. Cancellation of deeds for duress, fraud and undue influence. One who seeks to set aside a deed for fraud has the burden of proof. *Brown v. Brown*, 44 S. C. 378 (22 S. E. Rep. 412). A deed procured by arguments addressed to the understanding, or by mere appeal to the convictions, of the grantor will not be set aside for undue influence. *Hammond v. Welton*, Mich. (64 N. W. Rep. 25). A deed of parents of sound mind of their real estate to certain of their children to the exclusion of others, without any money consideration, will not be set aside in the absence of any undue influence. *Hester v. Sample*, Ia. (68 N. W. Rep. 468). A deed from a man to a woman with whom he has been living for many years, both believing that they were husband and wife, in consideration of love and affection, is not void for fraud or undue influence. *Edwards v. Thomas*, 170 Pa. 84 (82 Atl. Rep. 580). As a general rule one who seeks to cancel a deed on account of fraud must make restoration of the consideration. *Bowden v. Achor*, 95 Ga. 248 (22 S. E. Rep. 254); but where a deed is rescinded for constructive fraud the equitable duty of the grantor to return the consideration may be satisfied by the court decreeing the amount of such consideration to be credited on a debt due from the grantee to the grantor. *McParland v. Larkin*, 155 Ill. 84 (39 N. E. Rep. 609). A deed procured by a wife from her husband, through deception and fraud, while she was living in secret adultery, may be set aside. *Byrd v. Byrd*, 95 Tenn. 364 (32 S. W. Rep. 898). A deed by a husband to his wife procured by her fraud or undue influence, which makes an unreasonable provision for the wife, may be set aside by his heirs. *Lins v. Lindhardt*, 127 Mo. 271 (29 S. W. Rep. 1025). A conveyance by a wife to her husband procured by his threats to take her children away from her and prevent her from seeing them again will be set aside. *Kellogg v. Kellogg*, 21 Colo. 181 (40 Pac. Rep. 858). Where, in an action to set aside a deed on account of mental incapacity of the grantor, such incapacity is shown to have existed prior to the date of the deed it will be presumed to continue. *Stump v.*

Miller, 142 Ind. 442 (41 N. E. Rep. 812). Where one has executed a deed for a fraudulent purpose a court of equity will not set it aside for him. *Muller v. Blake*, 155 Ill. 110 (39 N. E. Rep. 658). A deed the execution of which has been procured by duress is not void, but voidable. *Commercial Nat. Bank v. Wheelock*, 52 O. St. 534 (40 N. E. Rep. 636, 49 Am. St. Rep. 738). Particular fact case in which a deed was set aside on account of fraud and undue influence. *Humphrey v. Ringler*, Ia. (62 N. W. Rep. 685). Particular facts held sufficient to set aside a deed by a husband to his wife, on the ground of undue influence. *Lins v. Lindhardt*, 127 Mo. 271 (29 S. W. Rep. 1025). Particular facts held insufficient to show that a deed executed by an aged father to his son was procured by undue influence. *Davis v. Latta*, Ia. (62 N. W. Rep. 17). Particular facts held insufficient to show duress. *Rendlemen v. Rendlemen*, 156 Ill. 568 (41 N. E. Rep. 223); *Page v. Cranford*, 43 S. C. 193 (20 S. E. Rep. 972); *Benjamin v. Drafts*, 44 S. C. 430 (22 S. E. Rep. 470). Particular facts held insufficient to cancel a conveyance of right of way to a railroad company, for fraud. *Grundy v. Louisville & N. R. Co.*, Ky. (32 S. W. Rep. 392). Particular facts held insufficient to set aside a deed of land in exchange for bank stock on account of fraudulent representations as to the value of the stock. *Anderson v. Black*, Ky. (32 S. W. Rep. 468). Particular facts held insufficient to show incapacity of an aged grantor. *Pennington v. Stanton*, 125 Mo. 658 (28 S. W. Rep. 1067). Particular facts held sufficient to set aside a deed executed by an aged person to his grandchildren on the ground of incapacity to execute. *Boggess v. Boggess*, 127 Mo. 305 (29 S. W. Rep. 1018). Particular facts held insufficient to show incapacity on account of intoxication. *McGown v. Brooks*, Miss. (16 So. Rep. 436).

Sec. 153. Cancellation of deeds for fraud and undue influence—Fiduciary relations. Where an aged person executed a voluntary deed to the six year old son of his confidential adviser it was held that, in an action to set aside such deed for fraud and undue influence, the grantee had the burden of proof. *Ryan v. Price*, 106 Ala. 584 (17 So. Rep. 734).

The court say: "In *Waddell v. Lanier*, 62 Ala. 847, it was held, that where the grantor and grantee sustain relations of trust and confidence—which includes not only cases where there exists the formal and technical fiduciary relation, such as guardian and ward, parent and child, attorney and client, principal and agent, but all cases in which confidence is reposed by one party in the other, and the trust is accepted under circumstances which show that the confidence was founded on the intimate personal and business relations existing between the parties, which gave the other party an advantage or superiority—any transaction between them will be narrowly watched and closely scrutinized by a court of equity, and relief will be granted against contracts entered into between them, unless the party claiming the benefit of the contract, shows by clear and convincing proof that he acted with perfect good faith, and did not abuse or betray the confidence reposed in him; and where the donee is of superior mental capacity, or the donor of weak or feeble intellect, the presumption of fraud will require strong evidence to remove it. In *Boney v. Hollingsworth*, 23 Ala. 690, it was said: 'There may be no fraud, everything may be honest and fair; but until the act is satisfactorily accounted for, the inference of fraud, artifice, or abuse of confidence, is so strong, that we think equity should relieve against it.' Of such transactions Judge Story says: 'And, indeed, considering the abuses which may attend any dealings of this sort between principals and agents, a doubt has been expressed whether it would not have been wiser for the law in all cases to have prohibited them; since there must always be a conflict between duty and interest on such occasions.' See, also *Kyle v. Perdue*, 95 Ala. 579 (10 So. Rep. 108); *Burke v. Taylor*, 94 Ala. 530 (10 So. Rep. 129); Story, Eq. Jur. §§ 807, 815; 1 Perry, Trusts, §§ 168, 194."

The rule above set forth applies to conveyances by patient to physician. *Unruh v. Lukins*, 166 Pa. 824 (31 Atl. Rep. 110); and also to conveyances between husband and wife. *Lins v. Lindhardt*, 127 Mo. 271 (29 S. W. Rep. 1025); and to a conveyance to a guardian by his ward. *Goodrick v. Harrison*, 130 Mo. 263 (32 S. W. Rep. 661). The rule was held to apply to a conveyance by female ward to her sister, the wife of her guardian, although the ward had attained her majority

before the execution of the conveyance, but her guardian had not made his final report. *McParland v. Larkin*, 155 Ill. 84 (39 N. E. Rep. 609).

Sec. 154. Quitclaim deeds. A quitclaim deed conveys all the title the grantor has at the time of its execution. *McInerney v. Beck*, 10 Wash. St. 515 (39 Pac. Rep. 130). A quitclaim deed conveys nothing as against a prior unrecorded warranty deed of the grantor. *Reed v. Knights*, 87 Me. 181 (32 Atl. Rep. 870). One claiming under a quitclaim deed will not be regarded as a *bona fide* purchaser without notice. *Fries v. Griffin*, 85 Fla. 212 (17 So. Rep. 66); *Webb v. Elyton Land Co.*, 105 Ala. 471 (18 So. Rep. 178).

Sec. 155. Miscellaneous notes. A forged deed conveys no title. *Shapleigh v. Hull*, 21 Colo. 419 (41 Pac. Rep. 1108). Particular evidence held insufficient to show that a deed was a forgery. *Brown v. Holzman*, 157 Ill. 165 (41 N. E. Rep. 611). The law presumes that the grantee of a deed paid the consideration therefor. *Jones v. Cannon*, 8 Hous. (Del.) 1 (31 Atl. Rep. 521). A deed of land by a husband to his wife for her support and maintenance is based on a sufficient consideration, as against his heirs. *Brown v. Brown*, 44 S. C. 378 (22 S. E. Rep. 412). A statute (Mo. Rev. Stat. 1889, § 3852) which prohibits the performance of work and labor on Sunday, does not invalidate a deed executed on that day. *Roberts v. Barnes*, 127 Mo. 405 (30 S. W. Rep. 113; 48 Am. St. Rep. 640). A statute curing defective conveyances cannot affect the vested rights of third persons acquired before its passage. Ark. Act, Apr. 13, 1893, applied. *Bank of Harrison v. Gibson*, 60 Ark. 269 (30 S. W. Rep. 39). A conveyance of land will not operate as a gift *causa mortis* unless made in expectation or contemplation of death by the donor. *Brunson v. Henry*, 140 Ind. 455 (39 N. E. Rep. 256). In an action to establish a lost deed claimed to have been executed by several joint makers proof of its execution by all of them must be made. *Neely v. Carter*, 96 Ga. 197 (23 S. E. Rep. 313). Where a wife executed a deed for her property to another at the solicitation of her husband, he representing that he had made a sale to such third party, which deed is deposited by the husband with another

party to be held as part of the stakes of a wager between him and the grantee in said deed, and the wife before the wager is determined notifies the grantee and the stakeholder of her rights and demands a return of the deed to her they become liable to her in damages for the loss she may sustain by their failure to comply with her demands. *Pollock v. Agner*, 54 Kan. 618 (88 Pac. Rep. 781). As to effect of alterations, see case reported under Evidence.

FORM OF DEEDS.

[In Vol. I, §§ 57-105; Vol. II, §§ 133-147; Vol. III, §§ 181-197, will be found a compilation of the statutory forms of deeds and acknowledgments for the several states and territories. Below we give such amendments, changes and additional constructions as have been made.]

Sec. 156. Arkansas. (See Vol. I, § 59; Vol. II, § 134; Vol. III, § 182.) For general act curing defective acknowledgments, see Acts, 1895, p. 37.

Sec. 157. California. (See Vol. I, § 60; Vol. II, § 135; Vol. III, § 183.) The power conferred upon court commissioners by Code Civ. Proc., § 259, "to take acknowledgments and proofs of deeds; mortgages," etc., was not affected by the subsequent enactment of the amendment to Civ. Code, § 1181, that "the proof or acknowledgment of any instrument may be made" before certain named officers, omitting court commissioners. *Malone v. Bosch*, 104 Cal. 680 (38 Pac. Rep. 516).

Sec. 158. Connecticut. (See Vol. I, § 62.) For act validating acknowledgments taken out of the state, see Pub. Acts, 1895, p. 704, § 7; same as to certain acknowledgments of married women. Pub. Acts, 1895, p. 473.

Sec. 159. Georgia. (See Vol. I, § 66; Vol. II, § 137; Vol. III, § 186.) "To authorize the record of a deed to realty or personalty, when executed out of the state, said deed must be attested by or acknowledged before a commissioner of deeds for the state of Georgia, or a consul or vice-consul of the United States (the certificate of these officers under their seal being evidence of that fact), or by a judge of a court of record in the state where executed, with a certificate of the clerk under the seal of such court of the genuineness of the signature of such judge, or by a clerk of a court of record under the seal of the court, or by a notary public of the state and county where executed, with a certificate under the seal of the court, from the clerk of the court under which the notary holds his appointment, or if appointed by the governor, then with a certificate from the secretary of state, certifying that said notary was at the time of the execution of the deed regularly commissioned and authorized by law to attest deeds and take acknowledgments thereof." Acts, 1895, p. 73.

Sec. 160. Illinois. (See Vol. I, § 68). For act curing defective acknowledgments, see Acts 1895, p. 129.

Sec. 161. Michigan. (See Vol. I, § 77, Vol. II, § 139; Vol. III, § 190). "Either the forms of acknowledgment now in use in this state, or the following, may be used in the case of conveyance or other written instruments, whenever such acknowledgment is required or authorized by law for any purpose. Begin in all cases by caption specifying the state and place where the acknowledgment is taken. First, in the case of natural persons acting in their own right: On this day of 18...., before me personally appeared A. B. (or A. B. and C. D.) to me known to be the person (or persons) described in and who executed the foregoing instrument, and acknowledged that he (or they) executed the same as his (or their) free act and deed. Second. In the case of natural persons acting by attorney: On this.....day of 18...., before me personally appeared A. B., to me known to be the person who executed the foregoing instrument in behalf of C. D., and acknowledged that he executed the same as the free act and deed of C. D. Third. In case of corporations or joint stock associations: On this..... day of.....18...., before me appeared A. B., to me personally known, who, being by me duly sworn (or affirmed), did say that he is the president (or other officer or agent of the corporation or association) of (describing the corporation or association) and that the seal affixed to said instrument is the corporate seal of said corporation (or association) and that said instrument was signed and sealed in behalf of said corporation (or association) by authority of its board of directors (or trustees) and said A. B. acknowledged said instrument to be the free act and deed of said corporation (or association). In case the corporation or association has no corporate seal omit the words "the seal affixed to said instrument is the corporate seal of said corporation (or association) and that," and add at the end of the affidavit clause, the words "and that said corporation (or association) has no corporate seal." In all cases add signature and title of the officer taking the acknowledgment.

Sec. 2. The acknowledgment of a married woman when required by law may be taken in the same form as if she were *sole*, and without any examination separate and apart from her husband.

Sec. 3. The proof of acknowledgment of any deed or other written instrument required to be proved or acknowledged in order to entitle the same to be recorded or read in evidence, when made by any person without this state and within any state, territory or district of the United States may be made before any officer of such state, territory or district authorized by the laws thereof to take proof and acknowledgment of deeds, and when so taken and certified as herein provided, shall be entitled to be recorded in this state, and may be read in evidence in the same manner and with like effect as proofs and acknowledgments taken before any of the officers now authorized by law to take such proofs and acknowledgments, and whose authority so to do is not intended to be hereby affected.

Sec. 4. To entitle any conveyance or written instrument acknowledged or proved under the preceding section, to be read in evidence or recorded in this state, there shall be subjoined or attached to the certificate of proof or acknowledgment, signed by such officer, a certificate of the secretary of state of the state or territory in which such officer resides, under the seal of such state or territory, or a certificate of the clerk of a court of record of such state, territory or district in the county in which said officer resides or in which he took such proof or acknowledgment under the seal of such court stating that such officer was, at the time of taking such proof or acknowledgment, duly authorized to take acknowledgments and proofs of deeds of lands in said state, territory or district, and that said secretary of state, or clerk of court, is well acquainted with the handwriting of such officer, and that he verily believes that the signature affixed to such certificate of proof or acknowledgment is genuine, unless such acknowledgment be taken before a notary public who certifies thereto under his seal of office, when such conveyance or written instrument may be read in evidence or recorded without such certificate.

Sec. 5. The following form of authentication of the proof or acknowledgment of a deed or other written instrument when taken without this state, and within any other state, territory or district of the United States or any form substantially in compliance with the foregoing provisions of this act, may be used. Begin with a caption specifying the state, territory or district, and county or place where the authentication is made. I,, clerk of the, in and for said county, which court is a court of record, having a seal (or, I,, the secretary of state of such state or territory), do hereby certify that, by and before whom the foregoing acknowledgment (or proof) was taken was, at the time of taking the same, a notary public (or other officer) residing (or authorized to act) in said county, and was duly authorized by the laws of said state (territory or district) to take and certify acknowledgments or proofs of deeds of land in said state (territory or district) and, further, that I am well acquainted with the handwriting of said, and that I verily believe that the signature to said certificate of acknowledgment (or proof) is genuine. In testimony whereof I have hereunto set my hand and affixed the seal of the said court (or state) this day of, 18..

Sec. 6. The proof or acknowledgment of any deed or other instrument required to be proved or acknowledged in order to entitle the same to be recorded or read in evidence, when made by any person without the United States, may be made before any officer now authorized thereto by the laws of this state, or before any minister, consul, vice consul, *charge d'affaires*, or consular agent of the United States resident in any foreign country or port, and when certified by him under his seal of office it shall be entitled to be recorded in any county of this state, and may be read in evidence in any court in this state in the same manner and with like effect as if duly approved or acknowledged in this state." Acts, 1895, pp. 346-348.

This statute expressly repeals How. Stat. § 5732.

Sec. 162. Minnesota. (See Vol. I, § 78.) For statute legalizing acknowledgments by notary public, see, Acts, 1895, pp. 743-751.

Sec. 163. New Jersey. (See Vol. I, § 85.) For general statute validating acknowledgments taken out of the state, see Pub. Laws, 1894, p. 116; Pub. Laws, 1895, p. 368.

Sec. 164. New York. (See Vol. I, § 87; Vol. III, § 194.) Laws, 1896, Vol. I, p. 602, ch. 547, § 223, re-enacts the form of deed set out in 1 Ballards' Annual, § 87, except the word "occupation" is omitted in the clauses fixing the identity of the grantor and grantee. The statute expressly provides that the form prescribed does not prevent the use of other forms.

"If the party or parties executing such conveyance shall be, or reside in any state or kingdom in Europe, or in North or South America, the same may be acknowledged or proved before any ambassador, minister plenipotentiary, or any minister extraordinary, or any *charge d' affaires*, of the United States, resident and accredited within such state or kingdom. If such parties be or reside in France such conveyance may be acknowledged or proved before the consul of the United States, appointed to reside at Paris; and if such parties be or reside in Russia, such conveyance may be acknowledged or proved before the consul of the United States appointed to reside at St. Petersburg." Laws, 1895, ch. 793, p. 560.

"The acknowledgment or proof of a conveyance of real property within the state, may be made without the state, but within the United States, before either of the following officers acting within his jurisdiction, or of the court to which he belongs. 1. A judge of the supreme court, of the circuit court of appeals, of the circuit court, or of the district court of the United States. 2. A judge of the supreme, superior or circuit court of a state. 3. A mayor of a city. 4. A commissioner appointed for the purpose by the governor of the state. 5. Any officer of a state authorized by the laws thereof to take the acknowledgment or proof of deeds to be recorded therein." Laws, 1896, Vol. I, ch. 547, § 249.

"The acknowledgment and proof of a conveyance of real property within the state, may be made without the United States before either of the following officers: 1. An ambassador, a minister plenipotentiary, minister extraordinary, minister resident, or *charge d' affaires* of the United States residing and accredited within the country. 2. A consul-general, vice-consul-general, deputy-consul-general, vice-consul, or deputy-consul, a consular or vice-consular agent, or a consular commercial or vice-commercial agent of the United States residing within the country. 3. A commissioner appointed for the purpose by the governor and acting within his own jurisdiction. 4. A person especially authorized for that purpose by a commission, under the seal of the supreme court, issued to a reputable person, residing in or going to the country where the acknowledgment or proof is to be taken. 5. If within the dominion of Canada, it may also be made before any judge of a court of record; or before any

officer of such dominion authorized by the laws thereof to take the acknowledgment or proof of deeds to be recorded therein. 6. If within the United Kingdom of Great Britain and Ireland or the dominions thereunto belonging, it may also be made before the mayor, provost or other chief magistrate of a city or town therein." Laws 1896, Vol. 1, ch. 547, § 250.

An officer taking an acknowledgment must be satisfied of the identity of the person making the same before taking the acknowledgment. Laws 1896, Vol. 1, ch. 547, § 252; and a married woman's acknowledgment may be taken as if she were unmarried. Id. § 251.

"The acknowledgment of a conveyance or other instrument by a corporation, must be made by some officer thereof authorized to execute the same by the board of directors of said corporation. The certificate of acknowledgment must be in substantially the following form, the blanks being properly filled: State of New York, County of.....ss. On..... day of in the year.....before me personally cameto me known, who, being by me duly sworn, did depose and say that he resided in, that he is the (president or other officer) of the (name of corporation), the corporation described in and which executed the above instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the board of directors of said corporation, and he signed his name thereto by like order. (Signature and office of officer taking acknowledgment). If such corporation have no seal, that fact must be stated in place of the statement required respecting the seal." Id. § 258.

"In the following cases a certificate of acknowledgment or proof is not entitled to be read in evidence or recorded unless authenticated by the following officers, respectively: 1. Where the original certificate of acknowledgment or proof is made by a commissioner appointed by the governor, by the secretary of the state. 2. Where made by a judge of a court of record in Canada, by the clerk of the court. 3. Where made by the officer of a state of the United States or of the Dominion of Canada authorized by the laws thereof to take the acknowledgment or proof of deeds to be recorded therein, by the secretary of state of the state, or the clerk, register, recorder or prothonotary of the county in which the officer making the original certificate resided, when the certificate was made, or by the clerk of any court of that county, having by law a seal." Id. § 260.

"An officer authenticating a certificate of acknowledgment or proof must subjoin or attach to the original certificate a certificate under his hand, and if he has, pursuant to law, an official seal, under such seal. Except when the original certificate is made by a judge of a court of record in Canada, such certificate of authentication must specify that, at the time of taking the acknowledgment or proof, the officer taking it was duly authorized to take the same; that the authenticating officer is acquainted with the former's handwriting, or has compared the signature to the original certificate with that deposited in his office by such officer; and

that he verily believes that the signature to the original certificate is genuine; and if the original certificate is required to be under seal, he must also certify that he has compared the impression of the seal affixed thereto with the impression of the seal of the officer who took the acknowledgment or proof deposited in his office, and that he verily believes the impression of the seal upon the original certificate to be genuine.

"A clerk's certificate authenticating a certificate of acknowledgment or proof, taken before a judge of a court of record in Canada, must specify that there is such a court, that the judge before whom the acknowledgment or proof was taken, was, when it was taken, a judge thereof; that such court has a seal; that the officer authenticating is clerk thereof; that he is well acquainted with the handwriting of such judge, and verily believes that his signature is genuine." *Id.* § 261.

Sec. 165. North Dakota. For general statute legalizing all acknowledgments, see, Laws 1895, p. 1.

Sec. 166. Virginia. (See Vol. I, § 101; Vol. II, § 144; Vol. III, § 197). The provisions of Laws 1890, ch. 55, as set forth in 2 Ballard's Annual, § 144, have been amended so as to read as follows: "Such court or clerk shall also admit any such writing to record as to any person whose name is signed thereto, upon a certificate of his acknowledgment before the said clerk, or before the clerk of any court of record in this state, or before the clerk of any court without this state, but within the United States, or before a justice, a commissioner in chancery of a court of record, or a notary within the United States, written on or annexed to the same, to the following effect, to-wit: 'County (or corporation) of, to-wit: I,, clerk of court, or deputy clerk of court, or a justice of the peace or commissioner in chancery of the court, or notary public for the county (or corporation) aforesaid, in the state (or territory or districts) of, do certify that E. F. (or E. F., and G. H., and so forth), whose name (or names) is (or are) signed to the writing above (or hereto annexed), bearing date on the day of, has (or have) acknowledged the same before me, in my county (or corporation) aforesaid. Given under my hand this day of Or upon the certificate of acknowledgment of such person before any commissioner appointed by the governor within the United States, so written or annexed to the following effect, to-wit: 'State (or territory or district) of, to-wit: I,, a commissioner appointed by the governor of the state of Virginia, for the said state (or territory or district) of, certify that E. F. (or E. F., and G. H., and so forth) whose name (or names) is (or are) signed to the writing above (or hereto annexed), bearing date on the of, has (or have) acknowledged the same before me in my state (or territory or district) aforesaid. Given under my hand this day of, or upon the certificate of the clerk of any court of record in this state, or the clerk of any court out of this state and within the United States that the said writing was proved as to him by two witnesses before such clerk, or before the court of which

he is clerk; or upon certificate under the official seal of any ambassador, minister plenipotentiary, minister resident, *charge d'affaires*, consul-general, vice-consul, or commercial agent appointed by the government of the United States to any foreign country, or of the proper officer of any court of such country, or of the mayor or other chief magistrates of any city, town or corporation therein, that the said writing was acknowledged by such person, or proved as to him by two witnesses, before any person bearing such appointment, or before such court, mayor or chief magistrate; and where any such writing purports to have been signed in behalf or by authority of any person or corporation, or in any representative capacity whatsoever, the certificate of acknowledgment by the person so signing the said writing shall be sufficient for the purpose of this and the preceding section, and for the admission of the said writing to record as to the person or corporation on whose behalf it is signed, or as to the representative character of the person so signing the same, as the case may be, without expressing that such acknowledgment was in behalf or by authority of such person or corporation, or was in a representative capacity. In the case of a writing signed in behalf or by authority of any person or corporation, or in any representative capacity, a certificate to the following effect shall be sufficient: State (or territory or district) of, county (or corporation) of, to-wit: I,, a, (here insert the official title of the person certifying the acknowledgment) in and for the state (or territory or district) and county (or corporation) aforesaid, do certify that (here insert the name or names of the persons signing the writing on behalf of the person or corporation, or the name of the person signing the writing in a representative capacity) has (or have) acknowledged the same before me in my county (or corporation) aforesaid. Given under my hand, this day of And where authority is given in this or the preceding section to the clerk of a court in or out of this state, but within the United States, such authority may be exercised by his duly qualified deputy." Acts 1895-96, p. 542.

Sec. 167. Wisconsin. (See Vol. I, § 104; Vol. II, § 147.) Wis. Laws, 1895, ch. 125, p. 212, enacts identically the same provisions concerning acknowledgments as those contained in the statute of Michigan (Acts, 1895), which we have set out in full in a preceding section, except the Wisconsin Act omits the exception concerning notaries public contained in the last clause of § 4 of the Michigan Act.

Sec. 168. Wyoming. (See Vol. I, § 105.) "Conveyances of land may be substantially in the following form: *Warranty deed.* A. B. grantor (here insert name or names and place of residence), for and in consideration of (here insert consideration) in hand paid, conveys and warrants to C. D., grantee (here insert the grantee's name or names and place of residence) the following described real estate (here insert the description) situate in county of state of Wyoming. Dated this day of A. D., 18.. A. B." Laws, 1895, p. 210, ch. 93. This form operates as a conveyance in fee simple with full covenants of war-

ranty, Id. "Quitclaim may be in substance in the following form: *Quitclaim deed.* A. B., grantor (here insert grantor's name or names and residence) for the consideration of (here insert consideration) convey and quitclaim to (here insert grantee's name or names) all interest in the following described real estate (here insert description), situate in the county of.....in the state of Wyoming. Dated this.....day of.....18..A. B." Laws, 1895, p. 211. This deed operates as a release and quitclaim and passes all interest of grantor both legal and equitable, but does not extend to after-acquired title unless words are added expressing such intention. Id. "A certificate of acknowledgment substantially in the following form shall be sufficient: State (name the state), County of (name the county), ss. I (here give the name of the officer and his official title) do hereby certify that (name of the grantor and if acknowledged by wife, her name, and add 'his wife'), personally known to me to be the same person whose name is (or are) subscribed to the foregoing instrument, appeared before me this day in person, and acknowledged that he (she or they) signed, sealed and delivered the said instrument as his (her or their) free and voluntary act, for the uses and purposes therein set forth. Given under my hand and seal this (day of the month) day of (month), A. D. (year)." Laws, 1895, p. 213. Where the deed purports to release the homestead right the certificate of acknowledgment must contain a clause substantially as follows: "Including the release and waiver of the right of homestead." Id. p. 213. The use of private seals is abolished. Id.

DEFINITIONS.

EPITOME OF CASES.

Sec. 169. Improved land—Incumbrances. "Improved" is not a technical word, having a precise legal meaning, when applied to real estate, but may mean land that is occupied. Bouv. Law Dict. "Improve." As generally understood, "improved land" is that which is occupied, or made better by care or cultivation, or which is employed for advantage. Webst. Dict. "Improve;" *Wilder v. Railroad Co.*, 65 Me. 332, 339 (20 Am. Rep. 698). Land uninclosed, and used as a mill yard, was held, in the case last cited, to be "improved land." *Osborne v. Canadian Pac. Ry. Co.*, 87 Me. 303 (32 Atl. Rep. 902). An incumbrance may be defined to be "every right to or interest in the land which may

subsist in third persons, to the diminution of the value of the land, but consistent with the passing of the fee by a conveyance." *Clark v. Fisher*, 54 Kan. 403 (88 Pac. Rep. 498). Incumbrances, in the ordinary sense, includes the lien of a docketed judgment. *Willsie v. Rapid Val. H. R. Co.*, S. Dak. (63 N. W. Rep. 546). A charge of legacies upon lands is an incumbrance. *Renniger v. Dwelling-House Ins. Co.*, 168 Pa. St. 350 (81 Atl. Rep. 1088).

Sec. 170. Miscellaneous definitions. As used in the Massachusetts statutes, Pub. Acts, 1889, chap. 214, p. 129, the word "bridges" is held to mean and include only the bridge structure exclusive of the approaches thereto. *New Haven and Fairfield Cos. v. Milford*, 64 Conn. 568 (80 Atl. Rep. 768). The term "buildings, improvements and other property" is broad enough to include "machinery, shafting, belting, pulleys, elevator, and fixtures," if used or contained in buildings or improvements upon the leased premises. *Peel v. Dakota F. & M. Ins. Co.*, S. Dak. (64 N. W. Rep. 206). The land lying in an open public street is in no proper sense a city lot, and the owner of the fee in such street is in no proper sense the owner of city lots lying upon the street to be paved. *City of Schenectady v. Trustees of Union College*, 144 N. Y. 241 (89 N. E. Rep. 67). Easement is so defined as to include the right to discharge smoke and soot on the premises of another. *Churchill v. Burlington Water Co.*, Ia. (62 N. W. Rep. 646). The word "house" is held not to include the barn and lot used in connection therewith. *Rudolph v. Pa. S. V. R. Co.*, 166 Pa. St. 430 (81 Atl. Rep. 131). Interest as applied to land is a broader word than title and includes both legal and equitable rights. *Gibb v. Fire Ins. Co.*, 59 Minn. 267 (61 N. W. Rep. 137; 50 Am. St. Rep. 405). A lien is said to be the ligament which binds certain property to a certain debt or claim for its payment or satisfaction. *United States Blowpipe Co. v. Spencer*, 40 W. Va. 698 (21 S. E. Rep. 769). "Owner of land" is primarily understood to mean the surface proprietor having also more as incident than otherwise the mineral and timber interests upon the surface. *Clifton Iron Co. v. Curry*, Ala. (18 So. Rep. 554). A store house is real estate

as to the tenant occupying it under an agreement that he might erect such house upon the land of his lessor and would remove the same upon his request. *Blanchard v. Bowers*, 67 Vt. 408 (31 Atl. Rep. 848). A canal and water pipe and the water supplied thereby have been held to constitute real estate. *Fudickar v. East Riverside Irr. Dist.*, 109 Cal. 29 (41 Pac. Rep. 1024). Surface water includes such as is carried off by surface drainage, that is by drainage independent of a water course. *Bunderson v. Burlington & M. R. R. Co.*, 48 Neb. 545 (61 N. W. Rep. 721). "Title" signifies the means by which the owner of land rightfully holds the possession thereof. *Fitzgerald v. Miller*, S. Dak. (68 N. W. Rep. 221).

Sec. 171. Relative—Rent—Rental value—Value of use. Washington Gen. St., § 1467, is as follows: "When any estate shall be devised to any child, grandchild, or other relative of the testator, and such devisee shall die before the testator, leaving lineal descendants, such descendants shall take the estate, real and personal, as such devisee would have done in case he had survived the testator." Construing this statute it is held that the wife of a testator dying before his death is not a relative within the provisions of this statute. *In re Renton's Estate*, 10 Wash. St. 538 (39 Pac. Rep. 145). "Rent has been defined to be 'a certain profit issuing yearly out of lands and tenements.' 12 Am. & Eng. Enc. Law, p. 730. 'Rent is a compensation for the use of lands demised, and is treated as a profit issuing out of the lands and tenements corporeal.' 2 Woods, Landl. & Ten., § 445. 'A royalty payable upon the stone or ore taken from the land, or upon brick made from the earth thereon, is held to be a rent that may be distrained for, although the soil is gradually exhausted, and the royalty is not paid out of the renewing produce of the land.' Id. 'Rent may be in the form of royalty.' Gear. Landl. & Ten., § 73. Anything corporeal or incorporeal may be demised, including rights of way, timber, turpentine trees, water rights, mining rights. Id. § 3. We have held rent to be a "certain profit, either in money, provision, chattels, or labor issuing out of lands and tenements, in retribution or return for their use. *Merritt v. Fisher*, 19 Ia. 857"; *Lacey v.*

Newcomb, Ia. (68 N. W. Rep. 704). "Rental value" and "value of use" of real estate means substantially the same thing. They are the commercial value of the use of real estate, and the fact is ascertainable by direct proof of what it would rent for, or by the proof of facts from which a fair rental value may be known. The one is as direct and certain as the other. It may be assumed in judicial proceedings that the results of profits, if they are reasonable, definite, and certain, arising from the use of real estate, afford a proper basis for fixing a rental value. *Leick v. Tritz*, Ia. (62 N. W. Rep. 855).

Sec. 172. Shore. The term "shore," in its ordinary use, signifies the land that is periodically covered and uncovered by the tide, but it is sometimes applied to a river or pond, as synonymous with bank. In the absence of any qualification, a grant bounded by the "shore" of a river, when the grantor is the owner of the river, conveys the land up to the lowest point of the shore at any time, in order that the grantee may at all time have access to the stream by which the land is bounded. It is competent, however, for the grantor to so designate the line on the shore which shall constitute the boundary that there shall be no uncertainty in its location, and in such case the line of high or low water mark would be immaterial in determining the extent of the grant. *Freeman v. Bellegarde*, 108 Cal. 179 (41 Pac. Rep. 289; 49 Am. St. 76).

Sec. 173. Timber. Mesquite, a shrub or small tree indigenous of the deserts, is not "timber," within the meaning of United States Rev. Stat. § 2461, making it a crime to cut timber from the public lands of the United States. *Bustamente v. United States*, Ariz. (42 Pac. Rep. 111). The court say: "In *U. S. v. Stores*, 14 Fed. 824, Locke, J., in charging the jury says: 'The term "timber," as used in commerce, refers generally only to large sticks of wood squared, or capable of being squared, for building houses or vessels.' Again, we find: 'As a generic term, it (timber) properly signifies only such trees as are used in building ships or dwellings.' *U. S. v. Schuler*, 6 McLean, 28 Fed. Cas. No. 16,234. These definitions of 'timber,' as well as those given

by the various lexicographers, show us that it includes all kinds of wood used in the manufacture or construction of useful articles."

DESCENT.

EPITOME OF CASES.

Sec. 174. Children and grandchildren. The word "children" as used in How. Mich. Stat. § 5772a, which provides that "if the intestate shall have no issue, father or mother, his or her estate shall descend, subject to the provision herein made for the widow or husband, if a widow or husband survive the deceased, in equal shares to his or her brothers and sisters, and the children of the deceased brothers and sisters, by right of representation," refers only to sons and daughters in the first degree, and does not include grandchildren. *In re Chapoton's Estate*, 104 Mich. 11 (61 N. W. Rep. 892).

Sec. 175. Half bloods. In construing Ind. Rev. Stat. 1894, § 2627, which provides that, "kindred of the half-blood shall inherit equally with those of the whole blood; but if the estate shall have come to the intestate by gift, devise or descent from any ancestor, those only who are of the blood of such ancestor shall inherit; Provided, That on failure of such kindred, other kindred of the half-blood shall inherit as if they were of the whole blood;" and § 2625, which provides that where one dies without descendants or a father or mother his brothers and sisters who are living, and the "descendants" of such as are dead, shall take the estate, it is held that "descendants" of the half-blood take equally with those of the whole blood, except where the rule is affected by the exception contained in § 2627. *Anderson v. Bell*, 140 Ind. 375 (89 N. E. Rep. 785; 29 L. R. A. 541). See opinion for extensive consideration of the history and construction of these statutes. Va. Code 1887, §§ 2548, 2549, 2550, construed and applied—collaterals of the half-blood—when they take *per stirpes*. *Moore v. Conner*, Va. (20 S. E. Rep. 986).

Sec. 176. Adopted children. To establish heirship under acts providing for the adoption of children, the enactments must be looked to in order to ascertain the rights of the claimant. *Webb v. Jackson*, 6 Colo. App. 211 (40 Pac. Rep. 467). Citing, *Furgeson v. Jones*, 17 Ore. 204 (20 Pac. Rep. 842; 11 Am. St. Rep. 808; 8 L. R. A. 620); *Ex parte Clark*, 87 Cal. 688 (25 Pac. Rep. 967); *Shearer v. Weaver*, 58 Iowa, 578 (9 N. W. Rep. 907); *Tyler v. Reynolds*, 58 Iowa, 146 (4 N. W. Rep. 902); *Estate of Stevens*, 83 Cal. 822 (28 Pac. Rep. 879; 17 Am. St. Rep. 252). A child adopted by a special statute as the heir of one of his adopting parents does not thereby become entitled to inherit from the other. *Webb v. Jackson*, 6 Colo. App. 211 (40 Pac. Rep. 467). Under Mill. & V. Tenn. Code, §§ 4881, 4885-4891, providing for the adoption and legitimation of children, a decree may be rendered adopting a child but not legitimating him, although the petition ask for both, and such a child will inherit as an adopted child, but property will descend from him as an illegitimate child. *Murphy v. Portrum*, 95 Tenn. 605 (82 S. W. Rep. 688; 80 L. R. A. 268).

Sec. 177. Bastards. Bastards have generally no inheritable blood, and, save by express statutory enactment, cannot take by descent. A bastard who has been legitimated by order of the superior court, under the provisions of § 1787 of Code, by force of that provision of the law, may take by descent from his father only. Where, by the provisions of a will made by the great-grandfather of a bastard on the paternal line, an estate is vested in the father of a bastard for life, with remainder over to his children, and, he failing issue, remainder over in fee to other great-grandchildren of the testator, upon the death of the father of such bastard without issue other than such legitimated bastard, while the latter, by force of the statute, may take by descent from his father, he cannot take by purchase under the will of his great-grandfather, which devises the estate to his great-grandchildren generally; there being in the will no language expressly indicating a purpose to include within the scheme of his benevolence any bastard descendants. *Hicks v. Smith*, 94 Ga. 809 (22 S. E. Rep. 158). Property inherited by an illegitimate child who has been adopted, but

not legitimated, in a proceedings under Mill. & V. Tenn. Code, §§ 4381, 4385–4391, will descend from him according to § 8278, regulating the descent of property from illegitimate children. *Murphy v. Portrum*, 95 Tenn. 605 (32 S. W. Rep. 633; 30 L. R. A. 263). The right of illegitimate children to inherit is not affected by their being non-residents or foreigners. Pa. Act, April 27, 1855, Purd. Dig. page 934, pl. 40, applied. *In re Waesch's Estate*, 166 Pa. St. 204 (80 Atl. Rep. 1124). The progeny born of slave marriages which terminated before the emancipation of the parties thereto, while, perhaps, from a liberal point of view, they are not bastards, are yet, so far as want of inheritable blood is concerned, placed in the same category as bastards; and La. Stat. which provides as follows: “ * * * Bastards, also, shall be capable of inheriting or of transmitting inheritance, on the part of their mother, in like manner as if they had been lawfully begotten of such mother”—only makes the bastard legitimate so far as his mother is concerned. It does not make him legitimate so far as the kindred of his mother are concerned, and he cannot take by inheritance from collateral kindred upon his mother's side. *Williams v. Kimball*, 35 Fla. 49 (16 So. Rep. 788; 48 Am. St. Rep. 238; 26 L. R. A. 746).

Sec. 178. Descent to husband or wife—Statutes construed. Under Ala. Code, § 2353, a surviving husband is entitled to the use of his wife's separate realty during his life. *Thompson v. Thompson*, 107 Ala. 163 (18 So. Rep. 247). In Arkansas the rights of a surviving wife in an estate held by her husband for the life of another are fixed by the statute regulating the descent of personal property. Sand. & H. Ark. Dig., §§ 702, 706, 2488 applied. *Stull v. Graham*, 60 Ark. 461 (31 S. W. Rep. 46). Ark. Act, November 29, 1862 (Mansf. Dig. §§ 2599–2691), giving the widow who has relinquished dower a child's portion in her husband's estate, was repealed by the constitution of 1864. *Stull v. Graham*, 60 Ark. 461 (31 S. W. Rep. 46); following *Mack v. Johnson*, 59 Ark. 333 (27 S. W. Rep. 231). In Georgia, prior to December 13, 1866, a husband was entitled to take real estate descending to his wife. *Lott v. Wilson*, 95 Ga. 12 (21 S. E. Rep. 992). In construing Ind. Rev. Stat. 1894, § 2656,

which provides that a surviving wife takes no interest in real estate as against the mortgage of her husband for the purchase money, it is held that the statute applies to a mortgage executed by the husband to procure money with which to discharge liens existing on property, incumbered beyond its value, a conveyance of which he has taken, under an agreement to remove the liens as the payment of the consideration therefor. *Butler v. Thornburg*, 141 Ind. 152 (40 N. E. Rep. 514).

Sec. 179. Widow's quarantine. A widow left in possession under her right of quarantine, who is allowed by the heirs to continue the possession beyond the time given by the statute, does not thereby create a liability to pay rent. *Emery v. Emery*, 87 Me. 281 (82 Atl. Rep. 900). In construing Sand & H. Ark. Dig. § 2587, providing that "if the dower of any widow is not assigned and laid off to her within two months after the death of her husband, she shall remain and possess the mansion or chief dwelling house of her late husband, together with the farm thereto attached, free of all rent, until her dower shall be laid off and assigned to her," it is held that where a part of the farm on which the mansion house stands had been leased by the husband during his life time, she is not entitled to all the rents and profits until after the expiration of the lease, and takes her interest in the rents arising under the lease according to the statute regulating the descent of personal property. *Stull v. Graham*, 60 Ark. 461 (31 S. W. Rep. 46). Ga. Code, § 1768, applied—rights of widow to possession of dwelling house until assignment of dower—action for wrongful expulsion. *Stevens v. Stevens*, 96 Ga. 374 (28 S. E. Rep. 812). In New Jersey, a widow, before assignment of dower, has a right to rent the mansion house or its curtilage, or any part of it, and to collect and hold the rent. *Flynn v. O'Malley*, N. J. Eq. (88 Atl. Rep. 402).

Sec. 180. Advancements. "Where a mother conveys land to her son, who gives notes secured by a mortgage for the payment of the price after her death to her other children and to her grandchildren, his share as heir to be deducted therefrom, the transaction operates as an advancement." *Brunson v. Henry*, 140 Ind. 455 (39 N. E. Rep. 256). A

conveyance by a mother to her son in order to discharge an obligation owing by her to him will not be construed as an advancement. *Beakhurst v. Crumby*, 18 R. I. 689 (31 Atl. Rep. 753). In the partition of the lands of an intestate among his children and the children of a deceased son, the portion which the latter inherit should be charged with an advancement made by their father to such intestate. *Parsons v. Parsons*, 52 O. St. 470 (40 N. E. Rep. 165). Where it is the apparent intention of a testator that his children shall share equally in his estate, the interest of a child claiming as heir in such estate will be subject to deduction on account of money borrowed by such heir from the testator, although the former insists that the obligation given for the payment of the money is invalid. *In re Willock's Estate*, 165 Pa. St. 522 (30 Atl. Rep. 1043).

Sec. 181. Rights of creditors as against heirs. Under statute 3 and 4, W. and M., ch. 14, which bars action against heirs by creditors of their ancestor, to subject inherited lands to his debts, unless brought prior to their *bona fide* alienation of the land, it is held that a sale under a mortgage foreclosure is an alienation. *Stewart v. Blalock*, S. C. (22 S. E. Rep. 774). In construing S. Dak. Comp. Laws, § 3254, which provides that "lineal and collateral warranties, with all their incidents, are abolished; but the heirs and devisees of any person who has made any covenant or agreement in reference to the title of, in, or to any real property, are answerable upon such covenant or agreement to the extent of the lands descended or devised to them, in the cases and in the manner prescribed by law," it is held that a covenantee who, without any excuse, fails to file his claim for damages on account of the breach of the covenant of the deceased grantor against his estate, while the same is pending settlement, cannot maintain an independent action against his heirs on account of their having received property through him. *Woods v. Ely*, S. Dak. (64 N. W. Rep. 531). Assessment for street improvements existing against the property of a decedent may be collected of a devisee thereof, not being within the provision of N. Y. Code, § 2719, requiring the executors to pay the

decedent's debts and taxes assessed against him previous to his death. *In re Hun*, 144 N. Y. 172 (89 N. E. Rep. 876).

Sec. 182. Miscellaneous notes—Statutes construed. The descent of real estate is governed by the law of the state in which it is situated. *Williams v. Kimball*, 85 Fla. 49 (16 So. Rep. 788; 48 Am. Stat. Rep. 288; 26 L. R. A. 746). In Illinois it is held that one who is compelled to trace his descent from an intestate through non-resident aliens, is barred and incapacitated from inheriting real estate from such intestate. *Craig and Baker, JJ., dissenting. Bevan v. Went*, 155 Ill. 592 (41 N. E. Rep. 91; 81 L. R. A. 85). One who inherits *per stirpes* takes directly from the intestate, and is entitled to receive his full share of the estate without accounting for a debt due by his deceased ancestor to the intestate. *Powers v. Morrison*, 88 Tex. 188 (30 S. W. Rep. 851). See opinion for citation of conflicting authorities. Where slave marriages have terminated before, or have never been recognized by the parties thereto after, they became free persons, the offspring thereof have no inheritable blood. They cannot inherit property acquired by their ancestors after emancipation. *Williams v. Kimball*, 85 Fla. 49 (16 So. Rep. 788; 48 Am. St. Rep. 288; 26 L. R. A. 746). Where reasonable efforts to ascertain whether a person is living have proved unavailing, and he has been absent and not heard of by those who would naturally hear from him were he living, for seven years, such person will be presumed to be dead. *Prettyman v. Conaway*, 9 Houst. (Del.) 221 (82 Atl. Rep. 15). A child who was last heard of more than six years before the death of his ancestor, and at that time was sick with consumption, will be presumed to have died before the ancestor. *Leach v. Hall*, Ia. (64 N. W. Rep. 790). Where a man marries a second time during the life of his former wife, and all the parties live in the same vicinity, the second marriage being treated by them all as valid, for the purpose of determining the right to inherit from the father, it will be presumed that he and his first wife were divorced before such second marriage. *Leach v. Hall*, Ia. (64 N. W. Rep. 790).

Under Sand. & H. Ark. Dig. § 2488, an estate held by one for the life of another does not descend as real estate, but

as personalty. *Stull v. Graham*, 60 Ark. 461 (31 S. W. Rep. 46). Under § 2641, Ind. Rev. Stat. 1894, as it stood in Act May 14, 1852, a widow remarrying who held property by virtue of a previous marriage could not convey such property during such marriage, and upon her death during such marriage it descended to "her children by the marriage in virtue of which such real estate came to her, if any there be," and until her death a child who would inherit under this section has no title and it is not estopped by receiving the purchase price arising from a sale made in violation of the statute. *Horlacher v. Brafford*, 141 Ind. 528 (40 N. E. Rep. 1078). Mich. How. Ann. Stat., § 5990, regulating proceedings to determine who are heirs, is not limited to cases where the ancestor dies after the passage of the statute. It is to be invoked in any case where any person shall have deceased having title to lands. It is remedial in its character, takes away no vested rights and is like a statute establishing a rule of evidence or one designed to perpetuate testimony, unobjectionable, because in a sense retroactive. *Miller v. Davis*, Mich. (64 N. W. Rep. 338). Minn. Gen. Stat. 1894, § 4749, construed and applied—decree of distribution—force and effect of, and proceedings to set aside. *McNamara v. Casserly*, 61 Minn. 335 (63 N. W. Rep. 880). In construing Mo. Rev. Stat. 1889, § 4475, which provides that, "the issues of all marriages decreed null in law, or dissolved by divorce, shall be legitimate," it is held that the children of a void marriage are legitimate, and are entitled to inherit as such although there has been no decree annulling the marriage. The word "decreed" was substituted for the word "deemed" as contained in Mo. Rev. Stat. 1825, p. 328, § 8. *Green v. Green*, 126 Mo. 17 (28 S. W. Rep. 752). Under Wis. Ter. Stat. 1839, p. 184, § 38, real estate of one dying intestate without children descends equally to his next kin, who are his father and mother, and they take such real estate as tenants in common. *Brown v. Baraboo*, 90 Wis. 151 (62 N. W. Rep. 921).

DESCRIPTION OF REAL ESTATE.

EPITOME OF CASES.

Sec. 183. Sufficiency of descriptions. It is one of the essential elements in the description of real property in a conveyance that it must be sufficiently certain to furnish the means for identification of the premises intended to be conveyed; and, if it is too vague and uncertain for this purpose, the instrument containing it is inoperative and void. But a description is sufficient if the court can, with the aid of extrinsic evidence which does not add to, enlarge, or in any way change the description, fit it to the property conveyed by the deed. *McRoberts v. McArthur*, 62 Minn. 310 (64 N. W. Rep. 908). A description by metes and bounds is not necessary, where the premises are well known by name. *Lennig's Ex'rs v. White*, Va. (20 S. E. Rep. 881). A description as a certain part of a certain section in a certain civil township, county and state, the geographical names of which are given, is sufficient although the congressional township and range are not given. *Columbian Oil Co. v. Blake*, 18 Ind. App. 680 (42 N. E. Rep. 284). Where a deed describes by section, township and range, but does not mention the meridian, county or state, but does describe the grantor as being of the county and state wherein he owned land answering the description in the deed and under which the grantee has taken possession of such land, it is sufficient to pass the title thereto. *Garden City Sand Co. v. Miller*, 157 Ill. 225 (41 N. E. Rep. 753).

Sec. 184. Reference to other instruments for description. It is held that a description of lots which did not mention the state, county or city in which they were located, but designated them as a subdivision of lots recorded in a certain book and page in the records of the county, was held

sufficient upon it being shown that in the book and at the page mentioned there was pasted in the book a map designating the lots as indicated in the deed. *McCullough v. Olds*, 108 Cal. 529 (41 Pac. Rep. 420). The court say: "It is a general and well settled rule of law that 'a deed for a description of the land conveyed, may refer to another deed or to a map, and the deed or map to which reference is thus made is considered as incorporated in the deed itself.' Devl. Deeds, § 1020, and cases cited. So, also, it is a familiar rule that when a tract of land has been subdivided into blocks or lots, and a map thereof made on which the blocks or lots are designated by numbers, a description of the blocks or lots in a deed by the numbers so designated is sufficient, provided the map can be produced and identified. Of course the description of the premises in the deed must be sufficiently definite and certain to enable the land to be identified, or it will be void for uncertainty. But 'if a surveyor, by applying the rules of surveying, can locate the land the description is sufficient. And generally the rule may be stated to be that the deed will be sustained if it is possible from the whole description to ascertain and identify the land intended to be conveyed.' Devl. Deeds, § 1012. And see 5 Lawson, Rights, Rem. & Prac. § 2285, where it is said, citing numerous authorities, that 'if, notwithstanding an uncertain description, the intention of the parties can be gathered from the deed, or from oral proof, the grant is not void.'

The objection that the description in the deed to Coutts was void for uncertainty, because it did not state the state, county, or city in which the property is situated, is not tenable. Such a statement was not necessary, if without it the property could still be located and identified. *Beal v. Blair*, 88 Ia. 818; *Kykendall v. Clinton*, 3 Kan. 85; *Atwater v. Schenck*, 9 Wis. 160; *Kile v. Yellowhead*, 80 Ill. 208; *Smith v. Crawford*, 81 Ill. 296; *Devine v. Burleson*, 85 Neb. 238 (52 N. W. Rep. 1112). The deed in question described the lots by numbers, and as containing ten acres each in Reiner's subdivision of lot 1,108, said subdivision being recorded in Book 1, page 184, records of San Diego county. There was record evidence that Reiner owned lot 7 in Mission valley, and it was agreed that that lot was the same as lot 1,108. It

seems clear, therefore, that Reiner in making his deed to Coutts had in mind and referred to the lot which he owned and had had subdivided and platted. Under these circumstances we do not think it can be said, as matter of law, that the description was so defective as to be void for uncertainty.

The objection that the map offered in connection with the deeds does not appear to be the one referred to in the deeds, but the map of a survey made for Joshua Sloane, in June, 1868, is based on the indorsement found on the upper left hand corner of the map. But that indorsement cannot have the effect claimed for it. At most it would seem to indicate only that in June, 1868, Pascoe, as county surveyor, made a survey for Sloane of the ten-acre lot 'A' and then made the indorsement as a certificate of such survey.

The objection that the map, having been only pasted in the deed book and not recorded, could not be used to help out the description in the deed, is rested upon the authority of *Caldwell v. Center*, 80 Cal. 540 (89 Am. Dec. 131), and *Caldwell v. Nash*, 78 Cal. 43 (14 Pac. Rep. 385). In the case first cited the plaintiff produced a map from the recorder's office, and the defendants objected to it on the ground that 'it was made with pencil and not with ink,' and that, 'it is pasted in between the leaves of the book, but not recorded.' This court, after conceding that the parties to a deed, instead of setting out in full the metes and bounds or other complete designation of the tract intended to be conveyed, may describe it in whole or in part by reference to some instrument, as a deed, map, etc., which contains or furnishes such a description of the land that it, when read in connection with the deed, will completely identify the land, said: 'The objection should have been sustained. Had the deed referred to a map to be found in that place and condition, it would have been admissible in evidence, for it would have constituted in effect a part of the deed as much as if it had been copied into it. But the deed calls for a map duly recorded in the recorder's office, and by the utmost stretch of liberality the one produced cannot be regarded as recorded. The act concerning county records provides that the several instruments entitled to record shall be recorded "in large and strong bound books, and in a fair, large and legible hand." The necessary implication from this

provision is that the instrument must be copied into the proper book of record ; and in view of the purpose to be subserved by the recording of the several classes of instruments mentioned in the act—the making and preservation of accurate and durable official copies of such instruments—a copy made in pencil or other materials that would not permanently remain would not be within the spirit of the act. The map should for these reasons have been excluded.’ In the second case cited the deed was held void for uncertainty, because it appeared that the reference to the map therein was equally applicable to two different maps, and it was decided that, in such case, parol evidence was inadmissible to identify the one referred to. Without commenting on the cases cited, it is enough to say that there was no statute in 1858, and is none now, so far as we are advised, providing for the recording of maps. It is, however, a matter of common knowledge that it has been customary to deposit maps in the office of the county recorder, and to refer to them as ‘recorded,’ or ‘of record,’ in that office. And, when such a map is thus referred to, it may be identified by extrinsic evidence, and the fact that it is not recorded or of record, within the ordinary meaning of those words, is wholly immaterial. In the case of *Saunders v. Schmaelzle*, 49 Cal. 59, the deed, for a description of the property to be conveyed, referred to another deed ‘recorded in Sacramento ;’ and it was held that the description in the deed given was not vitiated by the fact that the deed referred to was falsely stated to be recorded in the county where the property was situated. And, in *Water Co. v. Swartz*, 99 Cal. 278 (88 Pac. Rep. 878) a sheriff’s deed described the property conveyed as the north half of block 86, Colton addition, a plat or map of which addition ‘is of record in the office of the county recorder of San Bernardino county, state of California.’ The map offered in evidence was found in a book of maps kept in the recorder’s office, and it was objected that it was not admissible, as it was not acknowledged so as to entitle it to record. It was held that ‘a map thus deposited within the recorder’s office is properly referred to in an instrument of conveyance as being “of record” therein, and may be received in evidence, even though it be not acknowledged.’ The map offered in evidence in this case was not objected to ; but, if it had been, we think it admis-

sible, notwithstanding the deed referred to it as 'recorded in Book one, page 184, records of San Diego county.'"

Sec. 185. Descriptions which have been held good. Where an instrument describes real estate as "my real estate" and erroneously designated the portion of the section, it was held to be sufficient to pass the title to the real estate within the section which the party then owned, such being the intention as admitted. *Rook v. Wilson*, 142 Ind. 24 (41 N. E. Rep. 811; 51 Am. St. Rep. 168). A deed to a railroad company of a right of way described as follows: "The following described real estate, situated in the county of Kingman, and state of Kansas, to-wit, a strip and tract of land one hundred feet wide, of which the center line of the route and line of the Denver, Memphis & Atlantic Railway, of Kansas, as the line is now surveyed, staked and located, is the center, being fifty feet each side of the center line of said route, over, across and through the following tract and tracts of land, as said route and line of said railroad passes through the same, to-wit, the south-east $\frac{1}{4}$ of Sec. 26, township 27 south, of range 8 west, and the right of said railroad company aforesaid, through its agents, employes, servants, or contractors, to encroach upon the adjoining lands, outside of the limits above mentioned, to which the parties of the first part have title or possession, for the purpose of building or constructing its roadbed and railroad, and of completing or trimming its cuts and fills, and for all other purposes for the building, constructing, or maintaining its roadbed, or to maintain and operate its said railroad." It was held not void for indefiniteness or uncertainty in the description of the right of way or land conveyed. *Denver, M. & A. Ry. Co. v. Lockwood*, 54 Kan. 586 (38 Pac. Rep. 794). A description beginning at "a yellow pine on Jonas Linn's line, thence east three-fourths of a mile with said line to a stake, thence southeast to the top of Blue Mountain so as to include all the 'tendible' land, thence with said ridge around to the beginning — containing about 200 acres, and known as the 'Salt Springs Tract,' on Citico creek," was held not to be void on account of its being indefinite and uncertain. *Hebard v. Scott*, 95 Tenn. 467 (32 S. W. Rep. 390). A deed by a railroad describing the land as "all and singular the railroad

of the St. Louis, Arkansas and Texas Railway Company in Arkansas and Missouri, * * * through the counties of * * * and Dunklin, in the state of Missouri * * * ; also all its lands and rights of way, depots, and depot grounds, * * * together with all the real estate * * * of said railway company, * * * wherever situated, * * * ” was held sufficient to pass title to its land held in one of the counties named. *Fordyce v. Rapp*, 181 Mo. 354 (38 S. W. Rep. 57). In an action to recover rent on a verbal lease, an allegation that defendant leased the “ premises known as the ‘ Northeast Corner of Ross Island,’ situated in the county of M., state of O., for a floating house or beer garden,” was held to be a sufficient description of the premises. *Kiernan v. Terry*, 26 Ore. 494 (88 Pac. Rep. 671). A description in a mortgage by a legatee as her interest in the estate of the testator “ as child and heir at law,” reference being made to the administration records for a more complete description, was held sufficient. *Chaffee v. Browne*, 109 Cal. 211 (41 Pac. Rep. 1028).

Sec. 186. Descriptions which have been held void. “A piece or parcel of land near Bacon Quarter Branch” is too vague and indefinite to convey title. *George v. Bates*, 90 Va. 839 (20 S. E. Rep. 828). A description as the “ N. E. part of S. E. one-fourth of S. E. one-fourth ” of a certain section, was held void. *Tatum v. Croom*, 60 Ark. 487 (30 S. W. Rep. 885). A description in a mortgage as “all that certain tract or parcel of land adjoining the lands of J. S. on the east, P. S. on the south, and H. A. on the north, being a portion of the north end of the upper half of the lower half of the upper section of C.’s reservation,” was held insufficient. *Swatts v. Bowen*, 141 Ind. 322 (40 N. E. Rep. 1057). A description as “part of claim No. 2,087, survey No. 440, in township 6 south, of range 8 west, and part of claim No. 559, survey No. 696, in township 6 south, of range 7 west, saving and excepting 73 76-100 acres off of claim No. 2,087, survey No. 440, sold by Catherine Fisher, by virtue of an order of the probate court made at the January term, 1869, sold to pay debts,” was held void for uncertainty. *Borders v. Hodges*, 154 Ill. 498 (39 N. E. Rep. 597). A description as “two-

thirds" of a particularly described lot, without any description, or even attempted identification, of the particular two-thirds of the parcel intended to be embraced, is void. *Mutual Bldg. & L. Ass'n v. Wyeth*, 105 Ala. 689 (17 So. Rep. 45).

Sec. 187. Parol evidence to aid and apply. Parol evidence is admissible for the purpose of explaining terms used in a description but not to show what land was intended to be described. *Tatum v. Croom*, 60 Ark. 487 (80 S. W. Rep. 885). The omission of the county, state and land district in a description of land which gives the sectional subdivision, township, and range, may be cured by parol evidence showing that the grantor owned certain land corresponding to the description in the deed, that he and his grantee live near it, and that he never owned any other land. *Webb v. Elyton Land Co.*, 105 Ala. 471 (18 So. Rep. 178). Unless a description is ambiguous, parol evidence is inadmissible to affect it in any way. *Elofrson v. Lindsay*, 90 Wis. 208 (68 N. W. Rep. 89). Where land is described as so many acres, parol evidence is admissible to show that it is composed of two tracts, used by the owner as one tract, although they are not contiguous. *Wildasin v. Bare*, 171 Pa. 387 (33 Atl. Rep. 365). Where the words descriptive of the *locus in quo* are, in the main, applicable to two parcels of land, the location may be determined by evidence of the circumstances surrounded and connected with the party and the land at the time of the conveyance. *Scates v. Henderson*, 44 S. C. 548 (22 S. E. Rep. 724). A lease which specifies that it is to embrace as many as fifty lots of land within certain described boundaries may be applied by parol evidence to particular lots within those boundaries, notwithstanding the boundaries may comprehend more than fifty lots; the assignee of the lessee having entered under the lease upon the premises in controversy, and the lessor, so far as appears, not contesting his right so to enter. *Gress Lumber Co. v. Coody*, 94 Ga. 519 (21 S. E. Rep. 217). Parol proof is admissible for the purpose of fitting the description to the land. *Hartsell v. Coleman*, 116 N. C. 670 (21 S. E. Rep. 392); *Callaway v. Henderson*, 180 Mo. 77 (82 S. W. Rep. 84); *Curdy v. Stafford*, 88 Tex. 120 (80 S. W. Rep. 551). In the later case the court say: "The lan-

guage of a deed is the language of the grantor, and if there be a doubt as to its construction, it should be resolved against him. Again, if an instrument admit of two constructions, one of which would make it valid, and the other of which would make it void, the former must prevail. An instrument which purports to convey "a part" of a certain designated tract of land, but which does not describe that part, is void for uncertainty. But one which purports to convey that part of a certain tract which is owned and claimed by the grantor is not void upon its face, for it may be shown by extrinsic evidence what particular part the grantor so owned and claimed. So a description of the thing conveyed as the interest had and claimed by the grantor in a part of certain land is capable of being made certain because it points out the part conveyed as the part in which the interest is owned and claimed." Parol evidence is admissible for the purpose of showing that a description used in a conveyance, as commonly understood in the vicinity, clearly designates the property. *Sullivan v. Collins*, 20 Colo. 528 (39 Pac. Rep. 334); Citing, *Laughlin v. Hawley*, 9 Colo. 170 (11 Pac. Rep. 45); *Chambers v. Watson*, 60 Iowa 839 (14 N. W. Rep. 336; 46 Am. Rep. 70); *McGregor v. Brown*, 5 Pick. 170; *Scheible v. Slagle*, 89 Ind. 323; *Caldwell v. Village of Carthage*, 40 Ohio St. 453.

Sec. 188. Construction of descriptions. Where the general description differs from that by courses and distances the latter control. *Haggin v. Lorenz*, 15 Mont. 309 (39 Pac. Rep. 285). When the particular description is uncertain and the general description is manifestly correct then it will control. *Calloway v. Henderson*, 130 Mo. 77 (32 S. W. Rep. 34). Where the description by metes and bounds includes a public highway the grantee takes a fee subject to the easement of the highway. *Foreman v. Presbyterian Ass'n.* Md.

(30 Atl. Rep. 1114). A description by metes and bounds will control a statement as to quantity. *Ford v. Springe Land Ass'n*, N. M. (41 Pac. Rep. 541). When there is, in the first place, a sufficient certainty and description and an additional term of description which fails in point of accuracy, it shall be rejected as surplusage. *Scates v. Henderson*, 44 S. C. 548 (22 S. E. Rep. 724). It is

held that if a party purchases a lot according to a map or plat and his deed describes the lot accordingly, a further description by metes and bounds or courses and distances would be subordinate to the description of the block by its number. *Masterson v. Munro*, 105 Cal. 431 (38 Pac. Rep. 1106; 45 Am. St. Rep. 57).

Sec. 189. Reference to other instruments in aid of construction. Where land is described in a deed by reference to another deed the entire description including the reservations and exceptions will be treated as incorporated in the conveyance. *Heppenstall v. O'Donnell*, 165 Pa. St. 434 (30 Atl. Rep. 1003). Where a mortgagor holding under a deed correctly describing the premises makes a description of them in his mortgage by metes and bounds, which description does not include quite all the land, it being added that the premises mortgaged are the same as those conveyed in the deed under which the mortgagor holds, as against such mortgagor, a purchaser at a foreclosure under such mortgage acquires title to the whole of the premises, although the description in the complaint, decree and foreclosure deed was the same as the description by metes and bounds given in the mortgage, without making any reference to the statement that the land was the same as that held by the mortgagor under his deed. *Bernstein v. Nealis*, 144 N. Y. 347 (39 N. E. Rep. 328).

Sec. 190. Supplying a missing side. Where in a deed to land, the quantity is mentioned as being a certain number of acres more or less, and in the geometric description of the land two sides of a rectangle by courses and distances are given, and also a third line, which commences at a point not on either of the other two, but runs upon a designated course to the point of beginning, and these three lines when properly platted, show three sides of a rectangle, a proper construction of such description, between the grantor and the grantee and their privies in estates, would supply the fourth side, even though the effect would be to pass to the grantee a greater number of acres than that expressly named in the verbal description; and particularly would this be true where the grantee, soon after the execution of the deed, entered into possession, and, with the acquiescence of the grantor, inclosed

by a fence the entire tract represented by such rectangle, and remained for a number of years in actual possession. Where the grantee under such deed conveys a moiety of the premises covered by the same to a third person, taking his notes for a portion of the purchase money, it is no defense to a suit instituted thereon that there is an outstanding title remaining in the plaintiff's grantor, or his heirs, in consequence of alleged ambiguity or uncertainty in the description contained in the deed under which the plaintiff held. This is so, even though the nonresidence and insolvency of the plaintiff be alleged and proved. The alleged ambiguity or uncertainty, upon a proper interpretation of the deed, does not really exist. *Ray v. Pease*, 95 Ga. 153 (22 S. E. Rep. 190).

Sec. 191. Quantity and distance. When a deed contains two descriptions, each complete in itself, of the land conveyed—one of the descriptions including all the land included in the other, and more besides—the deed passes title to all the land contained in the larger tract. *Lake Erie & W. R. Co. v. Whitham*, 155 Ill. 514 (40 N. E. Rep. 1014; 28 L. R. A. 612; 46 Am. St. Rep. 855). While a statement in a deed or upon a map as to the acreage of a certain tract of land is not at all conclusive or controlling as to the quantum of the land in the tract, and while, as a matter of description, it must go down, when coming in conflict with metes, bounds and monuments, yet cases are presented where a statement of acreage renders most valuable aid in fixing boundary lines. If the description of tracts of lands by monuments, distances, or otherwise is vague and indefinite, by reason of conflicting lines, or by the omission of a line, or from any other cause, then a statement of the acreage sheds valuable light upon the issue, and often serves as the acting, moving cause for the conclusion reached. *Hostetter v. Los Angeles Ter. Ry. Co.*, 108 Cal. 38 (41 Pac. Rep. 330). It is held that where a grantor conveys part of a lot by a deed in which the portion conveyed is described by metes and bounds, and then conveys the balance of the lot to another grantee by a deed in which it is described as being bounded by the land first conveyed, the grantee in the first conveyance is limited to the tract described in his deeds by metes and bounds, though the amount embraced therein be

less than was the intention of the parties to convey. *Probett v. Jenkinson*, Mich. (68 N. W. Rep. 648). Where a deed describes land as beginning at a point a certain distance from a monument, which point is described as the corner of another lot which was formerly conveyed by the grantor, and the distance given is wrong, and the land is further described as being bounded by the lot, the distance given will be rejected, where the grantor owns sufficient land, starting from the corner of the lot, to make a parcel of the dimensions called for by the deed. *Graves v. Mattison*, 67 Vt. 680 (82 Atl. Rep. 498).

Sec. 192. Construction of particular descriptions. When property mortgaged is described as "being on the left bank of the Mississippi river, and as having a certain front on the said river," the object intended to be mortgaged must be held to be the same as that which would have been intended by the parties to have been conveyed in an act of sale under the same description. Where property sold is described as "a sugar plantation on the left bank of the Mississippi river, having a front of one-fourth of one arpent, more or less, on said river, by eighty arpents in depth," the purchaser is entitled to delivery to the full extent of the premises, as specified in the contract, and to insist upon the call for the river as the front boundary. He has the right to exact a front on the river, and by that term is meant, not a front exceptionally on the river, as resulting from extreme high water or floods, but one to be found on the river in its ordinary stage of high water. . *La Branche's Heirs v. Montegut*, 47 La. 674 (17 So. Rep. 247). A deed which conveys 184 acres on the north side of a lot of land, described by its number, district and county, the lot being by statute a square, is sufficiently certain to embrace such a parallelogram as would result from drawing a line across the lot, parallel with its northern boundary, so as to cut off 184 acres. *Gress Lumber Co. v. Coody*, 94 Ga. 519 (21 S. E. Rep. 217). A description in a deed "as all of a certain farm composed of a tract called the M. and one called the P., the interest intended to be conveyed thereby being the entire interest and estate received by will from S., and which said farm is particularly described in a deed from P.," is held not to include land received by will from S. which was not

included in the deed from P., and which was a separate tract from either the M. or the P. *Jay v. Michael*, 82 Md. 1 (83 Atl. Rep. 322). Where one had inherited a quarter interest in a tract of land conveyed "one-quarter part of the undivided interest as heir" in the land, it was held that the deed operated as a conveyance of his entire quarter interest, it appearing that such was the intention. *Dean v. Shreve*, 155 Ill. 650 (40 N. E. Rep. 294).

The description in a deed, by metes and bounds, was as follows: "Commencing on the east line of the road leading from Skowhegan to Madison Mills, at the southwest corner of land of Alvin Smith [a point admitted]; thence east, on said Smith's south line and south line of N. Blanchard, to the southeast corner of said Blanchard's land [a point not in dispute]; thence south to Charles Baker's north line [a point not in dispute]; thence west," etc., to the place of beginning. It was contended by the defendant that the call, "thence south to Charles Baker's north line," meant southeast to said Baker's northeast corner, thereby including a small triangle of land, the premises in dispute, at the east end of the lot described. Held, that the description is plain, unambiguous, by courses, and to monuments; that Baker's north line is a monument, the course running to it specific, south, and therefore the triangle is not embraced in the description. Also that a caveat clause at the end of the above description, "Meaning to convey the north half of Dean Reed farm," standing alone, did not enlarge the specific grant. *Reed v. Knights*, 87 Me. 181 (82 Atl. Rep. 870). A description, in a deed, of "all of a certain tract or parcel of land lying in Belgrade, being part of lot numbered 192, being part of the southerly quarter, supposed to be five acres, more or less, and all the land which I own to the west of Clark's pond, so called, being the same pond that James Katon dug a drain to," conveys only that part of the southerly quarter, of lot 192 which lies in Belgrade, although the Belgrade line is some distance westerly of the west line of Clark's pond, and the grantor owned land between the Belgrade line and Clark's pond, which was in another town. *Knowles v. Bean*, 87 Me. 331 (82 Atl. Rep. 1017). The description in a lease as, "The house and premises lying and situate in the city of Jersey City, in the county of Hudson, and

state of New Jersey, known and designated as 'No. 264 Johnston Avenue,' and all the buildings, outhouses, and premise of said place, with the appurtenances," was held not to include a vacant and unimportant strip of land adjacent to Lot No. 264. *Morris v. Kettle*, 57 N. J. L. 218 (80 Atl. Rep. 879).

For construction of descriptions depending upon particular facts see, *Barrows v. Webster*, 144 N. Y. 422 (89 N. E. Rep. 357); *Peoria & P. U. Ry. Co. v. Tamplin*, 156 Ill. 285 (40 N. E. Rep. 960); *Shattuck v. Cunningham*, 166 Pa. St. 368 (81 Atl. Rep. 186); *Rieman v. Baltimore Belt R. Co.*, 81 Md. 68 (81 Atl. Rep. 444); *Hostetter v. Los Angeles Ter. Ry. Co.*, 108 Cal. 88 (41 Pac. Rep. 880); *Cox v. McGowan*, 116 N. C. 181 (21 S. E. Rep. 108); *Blumenthal Real Est. & Inv. Co. v. Broch*, 126 Mo. 676 (29 S. W. Rep. 886); *Vanbever v. Vanbever*, Ky. (80 S. W. Rep. 988).

EASEMENTS.

EPITOME OF CASES.

Sec. 193. As to what is an easement—Creation of. A water pipe leading from a driven well in a yard to a sink in the kitchen of a dwelling, there ending in a pump, by which water can be and is habitually drawn from the well to the kitchen for domestic purposes, the well and the water pipe being completely hidden from view, form an apparent and continuous easement, which will pass with a conveyance of the dwelling alone by the owner of both yard and house, the owner retaining the yard. The same result will follow a simultaneous conveyance, by the owner of both tenements, of the house to one person and of the yard and well to another, provided the grantee of the yard and well has notice of the existence of the connection between the well and the pump, and of the other conveyance, and such conveyance is made by his consent. *Larson v. Peterson*, 58 N. J. Eq. 88 (80 Atl. Rep. 1094). Under a statute empowering a married woman to convey only by deed duly acknowledged, it is held that an unacknowledged

deed will not create even an easement. *Tatum v. St. Louis*, 125 Mo. 647 (28 S. W. Rep. 1002). A landlord can not claim an easement for sewerage under demised premises to the extent of rendering them uninhabitable. *Sully v. Schmitt*, 147 N. Y. 248 (41 N. E. Rep. 514). A grantee of land bounded on a street acquires an easement of way in such street only when the grantor owns the street, or has the right to grant a right of way in it. *Cole v. Hadley*, 162 Mass. 579 (89 N. E. Rep. 279). An easement reserved in a deed is not affected by the fact that it is not mentioned in subsequent deeds of the land. *State v. Suttle*, 115 N. C. 784 (20 S. E. Rep. 725).

Sec. 194. A license does not create an easement. In a recent case the supreme court of Wisconsin say: "An easement is a permanent interest in the lands of another, with a right to enjoy it fully and without obstruction. Such an interest cannot be created by parol. It can be created only by a deed in writing, or by prescription. * * * A license creates no estate in lands. It is a bare authority to do a certain act or series of acts upon the lands of another. It is a personal right, and is not assignable. It is gone if the owner of the land who gives the license transfers his title to another, or if either party die. So long as a parol license remains executory it may be revoked at pleasure. So an executed parol license, under which some estate or interest in the land would pass, is revocable. Otherwise, title would pass without a written conveyance, 'in the teeth of the statute of frauds.' Nor is such a license made irrevocable by the fact that a valuable consideration is paid for it, or because expenditures have been made on the faith of it. None of these propositions are doubtful, upon the authorities." *Thoenke v. Feidler*, 91 Wis. 386 (64 N. W. Rep. 1030). Citing, Washb. Easem. (4th Ed.), 28, 431, par. 14; 6 Am. & Eng. Enc. Law, 141, and cases cited in note 8; *Hazleton v. Putnam*, 8 Pin. 107 (54 Am. Dec. 138); *French v. Owen*, 2 Wis. 250; *Clute v. Carr*, 20 Wis. 541 (91 Am. Dec. 442); *Lockhart v. Geir*, 54 Wis. 188 (11 N. W. Rep. 245); *Johnson v. Skillman*, 29 Minn. 95 (12 N. W. Rep. 149; 43 Am. Rep. 192); *Olson v. Railroad Co.*, 38 Minn. 479 (38 N. W. Rep. 490); *Minneapolis Mill Co. v. Minneapolis & St. L. Ry. Co.*, 51 Minn.

804 (58 N. W. Rep. 689); *Woodward v. Seely*, 11 Ill. 157 (50 Am. Dec. 445); *Wiseman v. Lucksinger*, 84 N. Y. 81 (88 Am. Rep. 479); *Cronkhite v. Cronkhite*, 94 N. Y. 828; *Eckerson v. Crippen*, 110 N. Y. 585 (18 N. E. Rep. 448; 1 L. R. A. 487); *White v. Railway Co.*, 189 N. Y. 19 (84 N. E. Rep. 887).

Sec. 195. Creation of by prescription. In order to constitute an easement by prescription the use must be adverse under claim of right, exclusive, continuous and uninterrupted and must be with the knowledge and acquiescence of the owner of the estate over which the easement is claimed. *Davis v. C. C. C. & St. L. Ry. Co.*, 140 Ind. 468 (89 N. E. Rep. 495). It must continue long enough to bar an action for recovery. *Field v. Mark*, 125 Mo. 502 (28 S. W. Rep. 1004). In Michigan it is held that the user of a public highway for the statutory period conclusively establishes the dedication and the right of the public in such highway, is not affected by the listing of the premises for taxes or the payment of taxes when assessed. *Campau v. Detroit*, 104 Mich. 560 (62 N. W. Rep. 718). In Michigan it is held that the exercise of the right of flowage for fifteen years and upwards creates a prescriptive right and gives title to the property so far as the right to flow is concerned as fully as if the right were conveyed by deed. *Williams v. Barber*, 104 Mich. 81 (62 N. W. Rep. 155). It is held that the use under a parol agreement of the right to flow surface water through a ditch of another does not ripen into an easement by continuing the statutory period of limitation. *Dunham v. Foyce*, 129 Mo. 5 (81 S. W. Rep. 837). The court say: "While the law regards the long enjoyment of an easement by one person in the lands of another as evidence that a deed once existed for the exercise of the right, and gives it the same effect as if existing, it is not true that the long exercise of a mere right or privilege of the use by one person in, over, or across the lands of another will create an easement therein, or burden the estate used in favor of the claimant, owner, or estate benefitted by the use. The use, exercise, or enjoyment of the right under the last-named circumstances may amount to nothing more than a mere license, to be revoked at the pleasure of the licensor, regard-

less of the length of time the privilege had been enjoyed. The limitation or prescriptive period furnishes to the beneficiary no right or authority for continual enjoyment." Where the abutting owners by mistake in placing their fences change the actual location of the highway and the public continue its use pursuant to such mistake for a period of twenty years, the public acquire an easement over the part so used by prescription and the land owner is barred. *Landers v. Town of Whitefield*, 154 Ill. 680 (89 N. E. Rep. 656).

An obligation in the nature of a servitude upon an estate conveyed with a water privilege may be enforced, without any personal obligation of subsequent purchasers, under a stipulation that the grantee, his heirs and assigns, shall pay a certain part of the sums paid for flowage or damages to the proprietors of upper lands; and where such a stipulation does not create an obligation to pay a portion of the repairs of the appliances for furnishing the water, a servitude charging the property with the payment of a portion of such expense may be created by prescription, where for more than fifty years an annual contribution by the owner of the servient estate has been made as a duty and collected by the other party as a right. *Holmes and Lathrop, JJ., dissenting. Whittenton Mfg. Co. v. Staples*, 164 Mass. 819 (41 N. E. Rep. 441; 29 L. R. A. 500).

Sec. 196. Permissive use by the public of a passway. Under the West Virginia Code, ch. 48, § 81, it is held that the continuous and uninterrupted use of the passway for twenty years or more by the people generally, though with the knowledge and consent of the owner of the land, is held not to constitute a county highway; it must be accepted or in some way recognized as such by the county authorities. *Boyd v. Woolwine*, 40 W. Va. 282 (21 S. E. Rep. 1020). The court say: "A road dedicated to the public must in some way, direct or by inference, be accepted by the county court upon its records before it can become a public county road. This may be done by laying it off into precincts or road districts, by appointing for it an overseer or surveyor, or by any act, formal or informal, showing plainly that it claims and treats the road as a public one. And if after notice of such

claim, the owner of the soil permitted the road to be passed over for any time, the road might well be inferred to be a public road. See *Brander v. Justices of Chesterfield*, 5 Call 548 (2 Am. Dec. 606); *Clarke v. Mayo*, 4 Call 874; *Com. v. Kelly* (1851), 8 Grat. 632; *Ball v. Cox*, 29 W. Va. 407 (1 S. E. Rep. 678). It is true that § 81, ch. 43, of the Code, by change of language made in 1881, now reads as follows: 'Every road * * * used and occupied as a public road * * * shall in all courts and places be taken and deemed to be a public road * * * whenever the establishment thereof as such may come in question'; yet the court has held that this means used and occupied under the sanction of the county court in some way expressed. See *Ball v. Cox*, 29 W. Va. 407 (1 S. E. Rep. 678); *Talbert v. King*, 32 W. Va. 6 (9 S. E. Rep. 48); *Yates v. Town of West Grafton*, 33 W. Va. 507 (11 S. E. Rep. 8); *People v. Underhill*, 144 N. Y. 316 (39 N. E. Rep. 333). This doctrine and this construction of this statute find their reason and justification in the following facts: In this country, new and sparsely settled as it is, pass-ways run here and there, used more or less during more than a lifetime of one generation with the silent permission of the owners of the land, but without the faintest intent on their part to dedicate, or thought that they were thereby dedicating, a right of way to the public. In contemplation of our law of county, police, and economy, there can be no county road which is not in some way committed to the care and supervision of some road surveyor, whose duty it is to see that it is kept open and free from obstruction." In another case it is said: "Where the public claims title to the easement by user, the burden rests upon the state, or its agencies, such as towns, as it does upon an individual claiming the right to pond water upon the land of another, to show title by adverse possession. The public, like an individual attempting to establish title under like circumstances, must prove such acts as indicate a continuous and unequivocal assertion of the right by the public for twenty years, and the best evidence of such user is the fact that the proper authorities have appointed overseers, and designated hands to work, and assume for the public the responsibility of keeping the way in repair." *State v. Fisher*, 117 N. C. 733 (23 S. E. Rep. 158).

Sec. 197. Light and air. In a well considered case in which authorities are collated and reviewed, it is held that the common law doctrine of easement for light and air by prescription does not prevail in Connecticut; and that an adjoining lot owner cannot be enjoined from erecting a building upon the line of his lot on the ground that it will partially shut out the light and air from the dwelling on the adjoining lot. The distinction is drawn between convenience and necessity. *Robinson v. Clapp*, 65 Conn. 365 (32 Atl. Rep. 989; 29 L. R. A. 582). The easement of light and air cannot be acquired, according to the general current and weight of authority in this country even by prescription. *Lindsey v. First Nat. Bank*, 115 N. C. 553 (20 S. E. Rep. 621).

Sec. 198. Way of necessity. A grant of land in the middle of land retained, impliedly gives the grantee a way to come out, to cross the land retained; but the necessity itself is not sufficient; the right must grow out of the grant. *Boyd v. Woolwine*, 40 W. Va. 282 (21 S. E. Rep. 1020.) The court say: "A way of necessity arises as an incident to a grant of land surrounded wholly by that of a grantor, when otherwise the land granted would not be accessible and the grantee would derive no benefit from the grant. It is an instance of the maxim that one is always understood to intend, as an incident, to grant whatever is necessary to give effect thereto which is the grantor's power to bestow." Citing, 2 Minor's Inst. 20; *Rogerson v. Shepherd*, 33 W. Va. 307 (10 S. E. Rep. 632); *Nicholas v. Luce* (1834), 24 Pick. 102 (35 Am. Dec. 302); 6 Rob. Prac. 804. The fact that a way would be a great convenience does not make it a way of necessity. *Field v. Mark*, 125 Mo. 502 (28 S. W. Rep. 1004).

Sec. 199. Private ways. Where one conveys land and reserves a right of way over a part thereof he has no right to build a fence on such right of way nor can he object to his grantee plowing the land over which the way is located unless it operates to interfere with his use of the way. *Moffitt v. Lytle*, 165 Pa. St. 173 (30 Atl. Rep. 922). A private right of way by prescription may be acquired by a visible, continuous, uninterrupted use for twenty years under a *bona fide* claim of right. *Boyd v. Woolwine*, 40 W. Va. 282 (21 S. E. Rep.

1020). In a recent case the supreme court of Georgia say: "In order to acquire the statutory prescriptive right to a private way by constant and uninterrupted use of the same for seven years or more, the use must relate strictly to the same identical strip of land over which such right is claimed." *Peters v. Little*, 95 Ga. 151 (22 S. E. Rep. 44). A grant of way in the nature of an easement conveyed by one deed can not be defeated by a subsequent deed conveying other abutting portions with power to the grantee therein to alter and rearrange such way. *Boland v. St. John's School*, 168 Mass. 229 (39 N. E. Rep. 1035). It is held that the owner of land over which there is a private way for passage only, may erect such gates or other structures as are necessary to protect his fields and which do not unreasonably interfere with the use of the way. *Hartman v. Fick*, 167 Pa. St. 18 (81 Atl. Rep. 842; 46 Am. St. Rep. 658).

Sec. 200. Public use of private way—When prescriptive. In a recent, well considered case the supreme court of Massachusetts say: "If one in walking or driving finds a way open before him, and uses it, because it seems to be intended for such use, this alone does not show that he uses the way as a matter of right, and such use would not establish a prescriptive right, no matter how frequent or how long continued it might be. Merely from using what is open to use, without more, no presumption arises that the use is adverse. *Thomas v. Marshfield*, 18 Pick. 240; *Kilburn v. Adams*, 7 Metc. (Mass.) 88 (39 Am. Dec. 754); *Hall v. McLeod*, 2 Metc. (Ky.) 98 (74 Am. Dec. 400); Washb. Easem. *185. In other words, there must be something to show that the way is used as a public way, rather than as an open private way. *Sargent v. Ballard*, 9 Pick. 251. This is illustrated by the example of the private streets which exist in some of our manufacturing cities. They are in appearance indistinguishable from public streets; they are kept constantly open, and in such a condition that all persons who choose can use them freely. But they remain private ways, unless use by the public under a claim of right is shown. *Durgin v. Lowell*, 3 Allen 398; *Danforth v. Durell*, 8 Allen 242. It has sometimes been suggested that the comparative amount of

rightful private use and of the public use which is without absolute right is an important element in determining whether such public use is under a claim of right. No doubt the amount of such unauthorized use may be considered as tending to show a use under the belief that the way is a public one, but the final test is not whether it is greater or less in amount than the rightful private use, but whether it is of such a character as to show the assertion or assumption of a right so to use the way, or a use under the belief that such use is a matter of public right. See *Weld v. Brooks*, 152 Mass. 297 (25 N. E. Rep. 719); *Taft v. Com.*, 158 Mass. 526, 552 (88 N. E. Rep. 1046). In order to show such adverse use by the public, it is not necessary that each or any traveler should in express words declare that he claims the right, as one of the general public, to travel over the way in question. *Blake v. Everett*, 1 Allen 248. Nor is it easy to express in what particular manner such assertion of right should be shown. Nevertheless the fact must exist that the way is used as a public right, and it must be proved by some evidence which distinguished the use relied on from a rightful use by those who have a right to travel over the private way, and also from a use which is merely casual or incidental or permissive. The amount, character, and duration of the use of a way by persons who had no lawful right to use it may have been such as to tend to show that such use was under the belief that the way was public." *Sprow v. Boston & A. R. Co.*, 163 Mass. 830 (89 N. E. Rep. 1024).

Sec. 201. Lateral support. Each of two adjoining lot owners is entitled to the support of the other's land. In actions for damages on account of removing the lateral support of another's land the measure of damages is the amount required to restore the property to its former condition with as good means of lateral support. Special damages must be specially pleaded. *Stimmel v. Brown*, 7 Houst. (Del.) 219 (80 Atl. Rep. 998). California Civ. Code, § 832, makes it unlawful for the owner of land to remove the lateral support of adjoining land without taking reasonable precautions to sustain it. Under this section it is held that such owner cannot escape liability for a failure to take such precautions for exca-

vating on his own land, by showing that the work was done by a contractor; and that where the owner of the land hires a contractor to make the excavation and no precaution for the lateral support is taken, both the owner and the contractor are liable to the adjoining owner for a subsequent falling of his land. *Green v. Berge*, 105 Cal. 52 (38 Pac. Rep. 589; 45 Am. St. Rep. 25). For cases which depend upon particular facts and illustrate the right of lateral support, see *Graves v. Mattison*, 67 Vt. 680 (32 Atl. Rep. 498).

Sec. 202. Reservation of easements in conveyance of the fee. An abutting owner's easement in the street is appurtenant to the land and cannot be reserved to the vendor on sale of the property so as to enable him to enjoin the commission of trespass thereon. *Pegram v. New York El. R. Co.*, 147 N. Y. 185 (41 N. E. Rep. 424). The court say: "If it could be assumed that the language of the reservation in the deed was sufficient to assign easements appurtenant to the property, such assignment would be absolutely ineffectual. The easements of an abutting owner in the street, which are invaded by the construction, maintenance, and operation of an elevated railway, are appurtenant to his premises; and, as it was said in the *Kernochan Case*, 128 N. Y., at page 568 (29 N. E. Rep. 65), 'in the nature of things, they are indissolubly annexed thereto until extinguished by a release or otherwise. They are incapable of a distinct or separate ownership.' The right to enjoin the continuance of the trespass by the defendants upon those easements could not be reserved upon the sale of the property. The right could only be possessed and enforced by its owner. *Pappenheim v. Railway Co.*, 128 N. Y. 436 (28 N. E. Rep. 518; 13 L. R. A. 401; 26 Am. St. Rep. 486). He is the person solely interested in the preservation of the estate in the abutting property in all its integrity, with all the incorporeal easements or rights and privileges appurtenant thereto; and he is the only person whom the law could regard as injured by a continuance of acts on the part of the defendants which affect property and prevent its full and fair enjoyment in those ways which would be possible if the street were used as originally intended."

Sec. 203. Nonuser of an easement. No matter how

the easement was acquired, nonuser for a less time than that required by the statute of limitations for the perfection of the easement is no presumption of an abandonment. But it seems to be settled that, when the nonuser is accompanied by acts on the part of either the owner of the dominant or servient tenement which manifest an intention to abandon, and which destroy the object for which the easement was created or the means of its enjoyment, an abandonment will take place. *Jones v. Van Bockhove*, 108 Mich. 98 (61 N. W. Rep. 842). Citing, *Davis v. Gale*, 82 Cal. 27 (91 Amer. Dec. 554); *Canny v. Andrews*, 128 Mass. 155; *Ward v. Ward*, 7 Exch. 888; *Reg v. Chorley*, 12 Q. B. 515; *Hale v. Oldroyd*, 14 Mees. & W. 789; *Williams v. Nelson*, 28 Pick. 141 (84 Am. Dec. 45); *Dyer v. Depui*, 5 Whart. 584; *Mowry v. Sheldon*, 2 R. I. 869; *Crain v. Fox*, 16 Barb. 184. In a recent case it is said: "Mere nonuse, for any length of time, of an easement created by grant, will not destroy or extinguish it. In order to extinguish it by nonuse, there must be some conduct on the part of the owner of the servient estate adverse to, and in defiance of, the easement, and the nonuse must be the result of it, and must continue for 15 years; or, to produce this effect, the nonuse must originate in, or be accompanied by, some unequivocal acts of the owner inconsistent with the continued existence of the easement, and showing an intention on his part to abandon it; and the owner of the servient estate must have relied or acted upon such manifest intention to abandon the right, so that it would work harm to him if the easement was thereafter asserted." *Mason v. Horton*, 67 Vt. 266 (81 Atl. Rep. 291; 48 Am. St. Rep. 817).

Sec. 204. Use of land by servient owner—When adverse. Cultivation of the soil by the servient owner, when not an interference with the enjoyment of the easement, does not constitute adverse possession by such owner. *State v. Suttle*, 115 N. C. 784 (20 S. E. Rep. 725). The court say: "The mere cultivation of the soil, being no interference with the enjoyment or right to use the easement, does not expose the occupant to an action of trespass by the dominant owner, and therefore does not constitute a possession adverse to him. *Osborne v. Johnson*, 65 N. C. 26; *Boomer v. Gibbs*, 114 N. C. 85 (19 S. E.

Rep. 226); *Hamilton v. Icard*, 114 N. C. 586 (19 S. E. Rep 607). The right to an easement may be acquired by prescription or lost by an adverse user, but in either case the user must be of such a nature as to expose the claimant under it to action at any time for twenty years. *Emery v. Railroad Co.*, 102 N. C. 282 (10 S. E. Rep. 141). The owner of agricultural interests may become a trespasser as to the reserved mineral interest, but only by engaging in mining for the mineral or minerals reserved. *Ashman v. Wigton*, Pa. Sup. (12 Atl. Rep. 74); and so he can, by direct interference indicating an unequivocal claim to the easement as distinguished from the right to cultivate, subject himself to liability to the dominant owner of the easement to build or raise a dam. The defendant had no reasonable ground to object to the instruction that his right was not infringed unless the water was actually ponded back further than Hildebrand was authorized to throw it back."

Sec. 205. Extinguishment or loss of an easement.
"If an easement for a particular purpose is granted, when that purpose no longer exists there is an end of the easement."
"Where a right, title, or interest is destroyed or taken away by the act of God, operation of law, or act of the party, it is called an extinguishment," and "an easement is one of the rights that may be extinguished or destroyed." If the act which prevents the servitude be incompatible with the nature or exercise of it, and be done by the party to whom the servitude is due, it is sufficient to extinguish it; and, if it be extinguished for a moment, it is gone forever. *Dennis Long & Co. v. City of Louisville*, Ky. (82 S. W. Rep. 271). Where a grantor conveys a tract of land in fee simple, with the right of way over adjacent lands of the grantor, mere nonuser of the easement for fifteen years or more is not an abandonment of the right, and does not defeat or take it away. Nothing short of an adverse hostile usage of the servient estate, inconsistent with the rights of the grantee, will start the statute of limitations running to defeat the right of the grantee to the easement. *Edgerton v. McMullan*, 55 Kan. 90 (39 Pac. Rep. 1021). Where the rights of the public are not involved, owners of land on opposite sides of the same street may, as between

themselves, consent to the closing of the street or anticipate its vacation, and either may convey to the other all interest in the land occupied by the street. As between themselves they have power to dispose of the entire estate and their subsequent grantors are bound thereby. *Comstock v. Sharp*, Mich.

(64 N. W. Rep. 22). The erection and operation of a public elevator and warehouse upon land acquired by a railway company, by condemnation, for public purposes, either by itself or its lessee, are neither a misuser nor an abandonment of its easement in the land occupied by such structure, and the owner in fee cannot maintain ejectment for the land so occupied. *Gurney v. Minneapolis U. El. Co.*, Minn.

(65 N. W. Rep. 136). The grant of an easement in a proposed street cannot be revoked on the ground that the dedication of the street to the public has failed for want of acceptance or user. *Wilkinson v. Suplee*, 166 Pa. St. 315 (30 Atl. Rep. 36). Where the owner of land used as a public alley conveys the fee thereof to another he cannot afterward assert an easement therein. *McNeal v. Rebman*, 168 Pa. 109 (31 Atl. Rep. 1002). The acceptance by one of a deed which includes land upon which an alley is located but makes no reference thereto, does not constitute an abandonment of the alley by him, he having actual as well as constructive notice of the existence and location of the alley. *Ermentrout v. Stitzel*, 170 Pa. 540 (33 Atl. Rep. 109).

EJECTMENT.

EPITOME OF CASES.

Sec. 206. As to when ejectment will lie—Tenants in common. Where the facts show a breach of a condition in a deed, ejectment may be maintained by the grantor, without first making a formal entry on the lands. *Ritchie v. Kansas, N. & D. Ry. Co.*, 55 Kan. 36 (39 Pac. Rep. 718). Where one is entitled to possession of a mine under a patent certificate from the United States, he has an estate in the mine, and

his right to maintain ejectment therefor is not subject to Hill's Ann. Laws, § 2178, providing that one year's adverse possession of a mine is a bar to an action for its possession. *Rader v. Allen*, 27 Ore. 344 (41 Pac. Rep. 154). Under Okla. Laws, 1890, Art. 82, ch. 70, a landlord may maintain ejectment against his tenant when the latter's right to possession has terminated on account of nonpayment of rent. *Hamill v. Falconick*, 3 Okla. 223 (41 Pac. Rep. 139); *Pappe v. Trout*, 3 Okla. 260 (41 Pac. Rep. 397). A tenant in common can maintain ejectment against a co-tenant in possession who disputes his right. *Mabie v. Whittaker*, 10 Wash. St. 570 (39 Pac. Rep. 172). Citing, Freem. Coten. (2d Ed.) §§ 248, 290; *University v. Reynolds' Ex'r*, 3 Vt. 542 (28 Am. Dec. 234); *Gale v. Hines*, 17 Fla. 773; *Wolfe v. Baxter*, 86 Ga. 705 (13 S. E. Rep. 18); *Hancock v. Lopez*, 53 Cal. 362.

Sec. 207. Title necessary to maintain ejectment—
Estoppel to deny title. A son who enters into the possession of land as tenant of his father thereby admits the title of the latter; and where, subsequently to his father's death, he remains in possession in subordination to a claim of title upon the part of his mother, and occupies the premises by her permission, he thereby admits title in her. If the mother thereafter make a will devising to the son a life estate, with remainder over to his children, the remaindermen, at the termination of the life estate, may, upon the devise of their grandmother, supported by the presumption of title resulting from her possession by her son, who became at her death the life tenant, recover in ejectment their respective undivided interests against any person holding adversely to them the premises so devised. *Beckham v. Maples*, 95 Ga. 773 (22 S. E. Rep. 894). Actual possession is sufficient to support ejectment until the defendant shows a better title. *Elofrson v. Lindsay*, 90 Wis. 203 (63 N. W. Rep. 89). Where a party in peaceable possession of land is entered upon and ousted by one not having title to or authority to enter upon the land, the party ousted may recover in ejectment upon his possession only; and his right to recover cannot be resisted by showing that there is or may be an outstanding title in another, but only by showing that the defendant himself either has title or authority to enter under the title.

Jackson v. Haisley, 35 Fla. 587 (17 So. Rep. 631). In Delaware it is held that an equitable title will not support ejectment. *Windsor v. Bacon*, 7 Houst. (Del.) 1 (30 Atl. Rep. 638). A possessory title will support ejectment. *Goodwin v. Scheerer*, 106 Cal. 690 (40 Pac. Rep. 18); *Trager v. Shepherd*, Miss. (18 So. Rep. 122). The title of a beneficiary of a trust will not support ejectment where the legal title is vested in a trustee. *Simmons v. Richardson*, 107 Ala. 697 (18 So. Rep. 245).

In a recent case it is said: "In the action of ejectment, it is incumbent upon the plaintiff to, and he must, make out a legal and possessory title to the premises in controversy; and the defendant's evidence may be confined to disproving the plaintiff's pretension, or rebutting the presumptions which may arise from his proofs. The defendant need not offer any evidence of title in himself, or of a third person. It is sufficient if he make it appear that the legal and possessory title is not in the plaintiff, for it is the general rule that the plaintiff must recover, if at all, upon the strength of his own title, and cannot do so by reason of the weakness of the defendant's title, the rule being that the possession gives the defendant a right against every person who cannot show a good title. This general rule is, however, subject to important qualifications, as, where the defendant has entered under the title of the plaintiff, and in subordination thereto, as tenant, trustee, coparcener or licensee, he cannot set up title in a third person, in opposition to that of the plaintiff, under which he entered."

Voight v. Raby, 90 Va. 799 (20 S. E. Rep. 824). On the question of estoppel, see *Ballards' Annual*, Vol. 1, § 137. In an action of ejectment by a grantee who has taken possession under his deed he is not estopped from showing that his grantor's title was divested by a paramount title under which he now holds. *Moore v. Smead*, 89 Wis. 558 (62 N. W. Rep. 426). One who takes possession under a guardian of minor heirs is estopped to question the title of such heirs. *Wolf v. Holton*, 104 Mich. 107 (62 N. W. Rep. 174).

Sec. 208. Ejectment by one co-tenant—Extent of recovery. In an action of ejectment by one of several co-tenants his recovery will be limited to his own interest in the

premises. *Marshall v. Palmer*, 91 Va. 844 (21 S. E. Rep. 672; 50 Am. St. Rep. 888). The court say: "One may sue in ejectment, and recover less than he claims in his declaration. *Clay v. White*, 1 Munf. 162; *Callis v. Kemp*, 11 Grat. 78; 2 Tuck. Comm. 174; but he cannot recover more than he proves that he has title to in himself. He cannot, in his own name, as sole plaintiff, recover the respective interests of his co-tenants. Their several interests, though undivided, are distinct and different. He cannot, in his own name, represent or bind his co-tenants. Each must sue for himself, and in his own name. The plaintiff can only recover such interest in the premises as he may prove that he himself is entitled to. *Hellyer v. King*, 6 Exch. 791; *Saul v. Dawson*, 8 Wils. 49; *Gray v. Givens*, 26 Mo. 291, 808; *Dewey v. Brown*, 2 Pick. 887. And while one may bring suit for the whole of the premises, and his action will be defeated if he should fail to prove that he was entitled to the entirety, but showed that he was entitled to some less interest, yet it is incumbent upon him not only to establish the legal title in himself to such less interest, but he must also establish the extent of such interest. If it appears that there are other persons interested with him as co-tenants, he must prove what is the share or proportion of the land that belongs to him. His undivided interest must be made certain and definite. It must be clearly designated. Code, Va., § 2747. If he fails to do this, so that it cannot be specified by the verdict of the jury or the judgment of the court, he cannot recover, and judgment must be rendered for the defendant. *Craig v. McBride*, 9 Dana 427; *Craig v. Taylor*, 6 B. Mon. 457; *Calis v. Kemp*, 11 Grat. 78; *Dawson v. Mills*, 82 Pa. St. 302." In ejectment by a tenant in common against a person in possession without right, the plaintiff can recover only to the extent of his title. *Johnson v. Hardy*, 48 Neb. 368 (61 N. W. Rep. 624; 47 Am. St. Rep. 765). When a tenant in common seeks to recover of a defendant the exclusive possession of land, he should prove, not only his own title to an undivided interest, but also that the defendant has no title to any interest. *Davison v. Wallingford*, 88 Tex. 619 (32 S. W. Rep. 1080.)

Sec. 209. Ejectment against a railroad. Ejectment will lie against an operating railroad where its possession is without right and there is no acquiescence of the land owner such as will work an estoppel. Its public use is no defense. *Louisville, St. L. & T. R. Co. v. Rudd*, Ky. (30 S. W. Rep. 604). For a leading case upon this point with annotations, see *Ballards' Annual*, Vol. 3, §§ 233-240. See also Vol. 2, § 185.

Ejectment will lie against a railroad company for land, obtained by it under condemnation proceedings, at the suit of one not a party to the proceedings, who claims title under an unrecorded deed executed before the filing of *lis pendens* in such proceedings, when it appears that such person had possession of the land under a contract of sale, and the railroad company offered to buy the land before commencing the proceedings. *Owen v. St. Paul, M. & M. Ry. Co.*, 12 Wash. St. 313 (41 Pac. Rep. 44).

Sec. 210. Defenses to action. In an action of ejectment the defendant may interpose any defense legal or equitable, the effect of which is to negative the plaintiff's right of possession. *Wanser v. Lucas*, 44 Neb. 759 (62 N. W. Rep. 1108). In an action to dispossess a tenant holding over, it is no defense to show an executory agreement of the plaintiff to make a contract of leasing in the future. *Gibson v. Needham*, 96 Ga. 172 (22 S. E. Rep. 702). An outstanding title sufficient to defeat a recovery in an action of ejectment must be a present subsisting and operative legal title upon which the owner could recover after asserting it by action. *Reusens v. Lawson*, 91 Va. 226 (21 S. E. Rep. 347). The Alabama Code, § 2698, provides "the general issue in an action in the nature of an action of ejectment is 'not guilty,' and under it the defendant may give in evidence the same matters which may be given in evidence under such plea in an action of ejectment; the general issue is an admission that the defendant is in possession of the premises sued for." In an action of ejectment under this statute by one who claims under an unrecorded deed, the defendant will be permitted to prove under the general issue that he purchased the premises from the common grantor without notice of the rights of the plaintiff.

Bynum v. Gold, 106 Ala. 427 (17 So. Rep. 667). In a later case the same court say: "The scope and extent of the plea of 'not guilty,' in an action of ejectment, is well defined. It casts upon the plaintiff the burden of proving a legal right to the possession of the premises in dispute, and, of consequence, whatever operates as a bar to his right of possession causes him to fail, entitling the defendant to a verdict. Unless it be of matter *puis darrein* continuance, the defendant may not plead any other plea. It is unnecessary, and is foreign to the nature of the action." *Lomb v. Pioneer Sav. & L. Co.*, 106 Ala. 671 (17 So. Rep. 670). Under the Georgia Code, § 8187, it is held that equities which will enable a purchaser in possession who has not received title to enforce specific performance, will also constitute a good defense to an action of ejectment by the vendor so long as such vendee is not in default in making payments of the balance of the purchase money. *Denson v. Denson*, 94 Ga. 525 (21 S. E. Rep. 281). In North Carolina it is held that an equitable defense must be specially pleaded. *Wilson v. Wilson*, 117 N. C. 851 (28 S. E. Rep. 272). For a collection of the statutes of the several states on the subject of defenses in ejectment and a full discussion of the subject, see Ballards' Annual, Vol. 1, §§ 181-189.

Sec. 211. Parties to the action. Under a statute requiring the occupant of the premises to be made a defendant, provided the property sought to be recovered was in fact occupied, does not necessarily require that all of the occupants shall be made parties defendant. *Hennessey v. Paulsen*, 147 N. Y. 225 (41 N. E. Rep. 516). In Missouri the husband may sue for the possession of his wife's land without joining her in the action. *Evans v. Kunze*, 128 Mo. 670 (31 S. W. Rep. 123). In an action of ejectment against a tenant, the landlord not being a party, he cannot by cross complaint allege that the plaintiff's title is a cloud upon his landlord's title and have his landlord's title quieted. *Moore v. Smead*, 89 Wis. 558 (62 N. W. Rep. 426). As to who are necessary parties in ejectment see Ballards' Annual, Vol. 2, § 186, and Vol. 3, § 248.

Sec. 212. Pleadings in actions of ejectment. A complaint which is defective because it fails to allege the termi-

nation of a preceding life estate may be cured by an answer which shows that fact. *Ogden v. Ogden*, 60 Ark. 70 (28 S. W. Rep. 796; 46 Am. St. Rep. 151). In a complaint in ejectment the description of the premises should so identify the land sued for as that the sheriff in the execution of the writ can deliver the possession in accordance with its mandate. *Harwell v. Foster*, Ga. (22 S. E. Rep. 994). In an action for the possession of land under the Ind. Rev. Stat. 1894, § 1066, the complaint must aver that the plaintiff is entitled to possession and the failure to so aver is not cured by a finding to that effect, it being outside of the issues. *Pittsburg, C. C. & St. L. Ry. Co. v. O'Brien*, 142 Ind. 218 (41 N. E. Rep. 528). Under Utah Comp. Laws, 1888, §§ 3789, 3793, one seeking to recover possession of land must allege that he has the right of, and is entitled to its possession, which is unlawfully being detained from him by the defendant after service of a written demand for possession. *Barnes v. Cox*, 12 Utah 47 (41 Pac. Rep. 557). Under Wash. Code, Civ. Proc., § 529, an allegation by the plaintiff that he is the owner of the premises is sufficient without deraigning his title. *Shannon v. Grindstaff*, 11 Wash. St. 536 (40 Pac. Rep. 123).

Sec. 213. Proof in actions of ejectment. Plaintiff must show a chain of title from a grantor in possession, or from the government. *Florence Bldg. & Inv. Ass'n v. Schall*, 107 Ala. 581 (18 So. Rep. 108). In order to establish the possession of the defendant, it is not necessary to prove his actual occupancy of the premises. *Kunze v. Evans*, 129 Mo. 1 (31 S. W. Rep. 114). Where both parties claim under a common source of title, plaintiff need not trace his title further than back to the common source. *Jay v. Michael*, 82 Md. 1 (33 Atl. Rep. 322). Where the defendant admits the seisin of the plaintiff and his own possession but maintains a right to possession he must establish his claim as an affirmative defense. *F. A. Hihn Co. v. Fleckner*, 106 Cal. 95 (39 Pac. Rep. 214). If the titles or rights of the plaintiff and defendant are from the same source and the plaintiff show the better title or right, he will be entitled to recover. *McLendon v. Horton*, 95 Ga. 54 (22 S. E. Rep. 45). The plea of

adverse possession admits defendant's possession at the commencement of the suit and plaintiff need not make proof thereof. *Tatum v. St. Louis*, 125 Mo. 647 (28 S. W. Rep. 1002). Where the plaintiff in ejectment claimed by a prescriptive title, and the defendant claimed through a sheriff's sale, evidence that at the time the color of title in the plaintiff's lessor originated such lessor admitted that the premises now in dispute belonged to the defendant in *fi. fa.*, and said that he, the plaintiff's lessor, wanted to buy the other half of the tract, was admissible; there being other evidence showing that he in fact purchased only half of the tract, but took a conveyance covering the whole of it, and also that he afterward disclaimed ownership of the premises in dispute, and declared that only the other half of the tract belonged to him. *Wade v. Johnson*, 94 Ga. 848 (21 S. E. Rep. 569). Ill. Rev. Stat. 1898, ch. 45, § 25, applied—proof of title when both parties claim from common source. *Lake Erie & W. R. Co. v. Whitham*, 155 Ill. 514 (40 N. E. Rep. 1014; 28 L. R. A. 612; 46 Am. St. Rep. 855). On questions as to the admissibility of evidence, see Evidence.

Sec. 214. Practice in actions of ejectment. Where the defendant does not claim title to the land and shows that his entry was not for the purpose of asserting title, a court should enter a nonsuit and not a judgment on the merits. *Zander v. Valentine Blatz Brewing Co.*, 89 Wis. 164 (61 N. W. Rep. 768). An affirmative allegation in an answer to the effect that a deed relied on by the plaintiff was intended as a mere security for a debt, does not constitute such an equitable defense as will deprive the defendant of a trial by jury as such allegation could have been proved under the general denial. *Locke v. Moulton*, 108 Cal. 49 (41 Pac. Rep. 28). Where the right to recover is based upon a legal title the plaintiff cannot recover upon an equitable title although the suit is brought in equity. *Garrett v. Belmont Land Co.*, 94 Tenn. 459 (29 S. W. Rep. 726). The summary remedy provided for in § 4072 of the Georgia Code, for the ejection of intruders cannot be used for the purpose of trying title to land. It can only be used in cases where an intruder enters upon the land without claiming in good faith a right to its possession, and refuses to

abandon the same. If one sells land to another and makes a conveyance to him, and afterwards refuses to give up the possession, he cannot be removed, under this section of the Code, as an intruder. In such case the purchaser must resort to some other remedy. If the vendor yields possession and afterward re-enters, this section is applicable. *Durden v. Clack*, 94 Ga. 278 (21 S. E. Rep. 521). The summary ejectment against a tenant at will provided for in § 1988, S. C. Rev. Stat., 1898, does not apply to one who goes into possession as assignee of the unexpired lease for a definite term. *Morris v. Palmer*, 44 S. C. 462 (22 S. E. Rep. 726).

Sec. 215. The judgment and writ of execution. In rendering a judgment in ejectment it is not necessarily error to render a joint judgment for possession against several defendants and a separate judgment for damages against each of them. *Andrews v. Carlile*, 20 Colo. 370 (38 Pac. Rep. 465). In an action of ejectment where it is shown that the plaintiff is entitled only to an undivided interest the judgment should be accordingly. *Keefe v. Doreland*, 16 Mont. 16 (39 Pac. Rep. 916). One who succeeds to the title of another upon his death, is not affected by a judgment of ejectment rendered against the administrator of such decedent to which neither his heirs nor such successor are made parties. *Andrews v. Anherston*, Miss. (16 So. Rep. 346). A judgment in ejectment is conclusive upon the parties thereto as to the right of possession. *Flynn v. Hite*, 107 Cal. 455 (40 Pac. Rep. 749). See Former adjudication. Also see Real actions—judgments. The close-jail execution provided for by Vt. Rev. Laws, § 1502, in cases where the action arises from the defendant's willful and malicious act, may be granted in an action under § 1321 for the wrongful withholding of real estate. *Sheeran v. Rockwood*, 67 Vt. 82 (30 Atl. Rep. 689).

EMINENT DOMAIN.

JOHNSON ET AL v. SCHMIDT.

(90 Wis. 301.)

Public use—Validity of statute—Constitutional law. A statute authorizing the appropriation of land for a drain "for agricultural, sanitary or mining purposes" is held unconstitutional on the ground that it does not affirmatively appear that such taking is for a public use.

Sec. 216. Facts stated—Statutory provisions. This is an appeal from an order of the circuit court, made in the above matter, which denies a motion to quash the petition, and to dismiss the proceedings commenced to organize and establish a drainage district, and to appoint commissioners to lay out, erect, and construct the proposed works, under the authority of chapter 401 of the Laws of 1891. The question raised is the validity of the statute under which it was proposed to organize the proposed drainage district, and to construct the proposed works. The act provides for the laying of ditches, drains, levees, or other works "across the lands of others for agricultural, sanitary or mining purposes." It provides that whenever it shall be made to appear to the circuit court of the proper county, in the manner provided, "that the proposed drain or drains, ditch or ditches, levee or levees, or other works, is or are necessary, or will be useful for the drainage of the lands proposed to be drained thereby, for agricultural, sanitary or mining purposes," the court shall appoint three competent persons as commissioners to lay out and construct the proposed works. Provision is made for the payment of damages to the owners of lands and such other property as are injured by the construction of the works. The cost of the works and the damages to be paid are to be raised by assessments of benefits upon the property within the assessment district which shall be benefited by the improvement.

The petition is conceded to be sufficient in form and substance to satisfy the statute. It is urged against the statute itself that it is invalid, in that it provides for the taking of private property, against the will of the owner, to promote a purely private enterprise.

NEWMAN, J.

Sec. 217. As to what is a public use — Statute held invalid. It is a settled law in this state that private property can be taken *in invitum* for a public use only. For a private use it cannot be taken. *Water Co. v. Winans*, 85 Wis. 26–39 (54 N. W. Rep. 1003). It is also settled that to dig ditches or drains across the lands of private owners, under an apparent legislative authority, is a taking of the lands. *Mills*, Em. Dom. § 30; *Smith v. Gould*, 61 Wis. 31 (20 N. W. Rep. 369); *Donnelly v. Decker*, 58 Wis. 461 (17 N. W. Rep. 389; 46 Am. Rep. 637). The question presented for decision is whether the digging of the ditches and drains and the construction of the levees and other works contemplated by the statute under consideration is for a public use. The provision of the statute is: “If it shall appear to the court that the proposed drain or drains, ditch or ditches, levee or levees, or other works, is or are necessary, or will be useful for the drainage of the lands proposed to be drained thereby, for agricultural, sanitary or mining purposes,” the court shall appoint commissioners. (Laws, 1891, ch. 401). There is, in the entire statute, no expression or intimation that it was any part of the consideration upon which the improvement should be authorized that it should be either necessary or desirable to promote any public interest, convenience or welfare. No doubt, such an improvement may be useful to some, or perhaps many, private owners of the land, by way of increasing the usefulness and value of their lands. But that is merely a private advantage. It interests the public only indirectly and remotely, in the same way and sense in which the public interest is advanced by the thrift and prosperity of individual citizens. *Donnelly v. Decker*, 58 Wis. 461 (17 N. W. Rep. 389; 46 Am. Rep. 637). Some home or homes might be made more cheerful and more healthful. But one man’s property cannot be taken to make another man’s home more cheerful or healthful. It is only

when it will make the homes of the public more healthful that any man's property can be taken for "sanitary purposes." But it is urged that the term "sanitary purposes" comprehends and imports the idea of the public health. If so, it might save this statute. Webster defines the word "sanitary" as "pertaining to or designed to secure sanity or health." The Century Dictionary defines it as "pertaining to health or hygiene, or the preservation of health." It will be seen that the word is of purely abstract meaning. It is utterly devoid of any suggestion of numbers or of public or private relation. It imports neither. For such purpose it is strictly neutral and impartial. Without some qualifying word it is inoperative to designate the purpose as a public one, or as in the interest of the public health. It is, no doubt, for the legislature to specify the use and purpose for which it authorizes private property to be appropriated. It should be expressed clearly; for it cannot be enlarged by a doubtful construction, nor be presumed to be larger than the purpose which it expressed. Dill. Mun. Corp., (4th Ed.) § 608. This is not a question of the construction of ambiguous words or terms. But it is an entire failure to express in any form that the taking of property for which it provides is to be for a public use. So it must be held that it does not provide for a taking for a public use. It could not lawfully provide for a taking for any other than a public use. It cannot support proceedings for the condemnation of lands as for a public use. It is entirely invalid. The proceedings should have been dismissed. The order of the circuit court is reversed, and the cause remanded, with directions to dismiss the proceedings.

Sec. 218. Constitutional law—Public use. When a legislative grant of authority to exercise the power of eminent domain contains the condition that the grantee shall pay more than the value of the property taken under the power, the grantee accepting the grant and exercising the power cannot question the constitutionality of the condition. *Dow v. Electric Co.*, N. H. (31 Atl. Rep. 22). As to what is due process of law, it is held that whenever, by the laws of a state or by state authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be for the whole state, or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person, or such proceeding in

regard to the property, as is appropriate to the nature of the case; the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections. *Saxton Nat. Bank v. Carswell*, 126 Mo. 436 (29 S. W. Rep. 279). The right of eminent domain is limited to the right to take only so much of the property of the citizen as may be necessary to answer the public use for which it is taken. *Dennis Long & Co. v. City of Louisville*, Ky. (32 S. W. Rep. 271). The necessity, expediency or propriety of exercising eminent domain, and the extent and manner of its exercise, are questions of general public policy, and belong to the legislative department, and it is held that the ordinance of a city providing for the opening of an alley was conclusive as to the public necessity. *City of Cape Girardeau v. Houck*, 129 Mo. 607 (31 S. W. Rep. 933). A statute (Mich. Local Acts 1893, p. 1071) which gives municipal authorities the power of eminent domain as to the lands of a particular cemetery association was held constitutional although such statute does not subject other similar associations to the same burden. McGrath, C. J., dissenting. *Woodmere Cemetery v. Roulo*, 104 Mich. 595 (62 N. W. Rep. 1010). The legislature has no power to determine what is a public use within the meaning of the constitution. *Logan v. Stogsdale*, Ballards' Annual, Vol. 1, §§ 119, 123, and authorities there cited. See also Vol. 2, § 201, and Vol. 3, §§ 260, 261.

PRESIDENT, ETC. B. & F. T. ROAD v. BALTIMORE, C. & E. M. P. R. CO.

(81 Md. 257.)

Constitutional law—Condemnation of a franchise—Corporations hold their franchise subject to the right of eminent domain. The Maryland Statute, Act 1894, chap. 162, which authorizes a street railway company to condemn the easement in the roadway of a turnpike, is held constitutional.

BRYAN, J.

Sec. 219. Statement of the case. By the act of 1894 (chapter 162), the legislature granted to the Baltimore, Catonsville & Ellicott's Mills Passenger Railroad Company the right to use electricity as a motive power on its railway between Baltimore city and Catonsville, and on an extension of it thereafter to be made to Ellicott City. By the same act this corporation was empowered to construct and operate double passenger railway tracks on the turnpike of the president, managers, and company of the Baltimore & Fredericktown Turnpike Road, with power to alter its grade, and to

change the location of the tracks which it already had on the turnpike. And the two corporations were authorized to agree upon the terms and conditions on which these rights should be exercised; and, in case they should fail to agree, the railroad company was empowered to acquire the necessary easement and estate by condemnation proceedings. It is well known and it is stated in the proceedings in this case, that, by virtue of a contract with the turnpike company, a passenger horse railway had been maintained and operated for many years on the bed of the turnpike between the city of Baltimore and Catonsville. It does not seem to be controverted that the property of the corporation which originally owned this horse railway, was sold under a foreclosure proceeding, and that the present appellee (under a slight change of name) has been invested with all its rights, property and duties, and subjected to all its obligations. The appellee has prosecuted condemnation proceedings; and, in due course, the jury have found and assessed damages under their inquisition. Without entering minutely into details, it is sufficient to state that the appellant filed a bill in equity, in which it alleged that the above act of assembly is contrary to the constitution of the United States; and it prayed that the appellee should be enjoined from proceeding under the inquisition, and from prosecuting any proceedings whatsoever, by way of condemnation to acquire any easement or estate in the turnpike road. The circuit court sustained the right of condemnation, and the appellant took its appeal.

Sec. 220. Impairing the obligation of contracts. The turnpike company was chartered by the act of 1804 (chapter 51); and under this act, it constructed its turnpike road, and has operated and maintained it from the time of its construction to the present day. There can be no doubt that the charter is a contract between the legislature and the corporation, which is under the protection of the constitution of the United States; and the same may be said of the contract made with the predecessor of the appellee in reference to the construction of the horse railroad. The legislature has no power to amend, alter, or impair any stipulation in either of these contracts. They must all be preserved inviolate in their

original integrity. If the act of assembly infringes any right granted by the appellant's charter, or releases any stipulation contained in the contract, it must to that extent be declared null and void. And it has been declared by this court that there is no difference in principle between a law that in terms impairs the obligation of a contract and one that produces the same effect in the construction and practical execution of it. *Chesapeake & O. Canal Co. v. Baltimore & O. R. R. Co.*, 4 Gill & J. 109. In the same case, at pages 144 and 145, it was said that a franchise, a corporate right to select and acquire land for the authorized purposes of the corporation, is property. "It is an incorporeal hereditament, not a legal title to the land itself, not a mere capacity or faculty to acquire and hold land, such as every individual possesses; but, in addition to such capacity, it is a right or privilege—a portion of the eminent domain vested in the corporation—to acquire the legal title to land subjected by the grant to its will, and thus to convert the incorporeal into a corporeal hereditament, and, after the franchise, to choose and condemn land for any particular public purpose, that portion of the eminent domain granted and subsisting in one corporation cannot be bestowed upon another, to the prejudice of the former grant; nor can any other legally acquire any such right of way or title to the land over which the franchise extends, as will hinder the former corporation in the exercise and enjoyment of its franchise." Therefore the legislature could not take away from the appellant the unrestricted right to the control and use of its road, and donate any portion of this right to the appellee.

Sec. 221. Right of eminent domain—Constitutional law—Condemnation of franchises. But there is a vital essential and paramount power belonging to the state which has never been surrendered to the general government, and which is not limited or embarrassed by any considerations inferior to a regard for the public welfare. It is the right of eminent domain, or the right to take private property for the public use, with just compensation previously paid or tendered to the owner. The legislature has the right to determine when the private property shall be thus taken; and the duty devolves on the courts to protect the rights of the owner by enforcing

just compensation before it is taken. Whatever doubts may have existed at one time on the question, and it is probable they did exist when the case of the canal company was decided, it is now settled by authority which this court is bound to obey that "the grant of a franchise is of no higher order, and confers no more sacred title, than a grant of land to an individual; and, when public necessities require it, the one as well as the other may be taken for public purposes on making suitable compensation, nor does such an exercise of the right of eminent domain interfere with the inviolability of contracts."

West River Bridge Co. v. Dix, 6 How. 507 (12 L. Ed. § 585); *Richmond, F. & P. R. Co. v. Louisa R. Co.*, 18 How. 88 (14 L. Ed. 55). As was natural and proper, these decisions have been followed in the opinions delivered by the state courts. We forbear to cite any of them, inasmuch as we consider that the federal authority marks out the course for us to follow, independently of any other consideration. It has been said by the supreme court that the power to take private property for public use "reaches back of all constitutional provisions." *Pompelly v. Green Bay Co.*, 13 Wall. 178 (20 L. Ed. 557). It has also been said on this subject that a grant made for one public purpose must yield to another more urgent and important. Of course, it rests with the legislature to determine when the necessity arises for making one public purpose subordinate to another which it regards as of a higher degree of utility. It is, of course, not held by any court that the legislature can bestow the property of any person, natural or corporate, upon another, but that private property cannot be exempted from the supreme right of eminent domain, on the ground that it is held by a chartered right. And, of course, the same must be said in cases where it is held by virtue of a private contract. We therefore feel obliged to hold that the act of 1894 (chapter 162) constitutionally conferred on the appellee the right to condemn the corporate property and franchises of the appellant, including such as were embraced within the scope of the contract in reference to the horse railway.

Sec. 222. Same — Practice. The statute law prescribes the mode in which the condemnation must be pursued.

After the inquisition has been reduced to writing, and signed and sealed by the jury, it is required to be returned to the circuit court of the county, which is invested with the jurisdiction to confirm it or set it aside. The value of the appellant's property and franchises will be very greatly diminished by the proceedings under this act of assembly; but for the injury thus done, including all damage which may be sustained by the seizure of its property, and any loss which may arise from an impairment of the value of its contract rights, it is the duty of the jury of inquisition to assess adequate compensation. The whole proceeding is subject to the power and control of the circuit court, which is the tribunal appointed by the law to afford redress where injustice has been committed by the jury. It is also its duty to see that the inquisition is regularly and properly conducted, and that the rights of the parties are duly protected. It is not competent for any other court to exert this jurisdiction. It is held that, where the law is constitutional under which condemnation is sought, a court of equity has no power to arrest the proceedings by injunction, because a special tribunal is established for supervising the exercise of the right of eminent domain, to which alone the power has been granted to hear and determine all questions which can arise regarding the inquisition. *Railroad Co. v. Patterson*, 37 Md. 125; unreported case of *Same v. Keerl*, decided at the same time; *Cumberland & P. R. Co. v. Pennsylvania R. R.*, 57 Md. 267. We think that the decree below ought to be affirmed. Decree affirmed.

Sec. 223. Condemnation of land already devoted to a public use—Railroad right of way. Montana Code Civ. Proc., 1887, § 601, provides that land appropriated to a public use cannot again be so appropriated unless the use to which it is to be applied is a more necessary public use. Construing and applying this statute it is held that the new use need not be a different one from that to which the land was originally appropriated; and that one railway company may condemn a portion of the right of way of another railroad, which is not actually being used for its roadbed. This right is not to be denied because the land sought to be so condemned might at some time be needed for a double track of road already in operation, nor because of inconvenience to such company. *Butte, A. & P. Ry. Co. v. Montana U. Ry. Co.*, 16 Mont. 504 (41 Pac. Rep. 232; 50 Am. St. Rep. 508; 31 L. R. A. 298). Many authorities are reviewed and reasoning indulged to great length, and in conclusion the court say: "To conclude, we adopt that

construction which is more jealously careful of the best interests of the state, and say that, where a railroad company traversing the side of a mountain in a mining section has within its right of way tracts of ground not necessary to the proper, successful, and safe operation of its system of tracks and spurs, and not used by it in connection with any such operations, and in all reasonable probability not necessary for any such future use, if another road seeks the same objective points, and in doing so is obliged to take part of such unused right of way to avoid a considerably more circuitous route, at a different grade, of very much greater cost, and of serious damage to many mining properties in their subterranean and surface operations, and withal would be obliged by the topography of the mountains to parallel the adversary road a part of the way, under such conditions the use of the unused parts of the right of way of the one company by the other is a more necessary public use than that to which such unused portions are already appropriated. Wherefore, the law will permit the taking, regarding the interference as a 'tolerable one,' to be compensated by damages to be paid." For a collection of the older authorities on the subject generally, see, 4 L. R. A. 785, note, and 50 Am. St. Rep. 538, note. For an epitome of the recent cases bearing upon the question, see, Ballards' Annual, vol. 1, § 517, vol. 2, § 205, vol. 3, § 267. In another recent case it is held that land constituting a portion of the right of way of one railway company, but leased by it to a private corporation, may be condemned for railway purposes by another railway company. *St. Louis, A. & T. H. R. Co. v. Belleville C. Ry. Co.*, 158 Ill. 390 (41 N. E. Rep. 916). The court say: "It is true that where property is already devoted to railroad purposes it could not be condemned by another railroad company for the same purpose. To authorize a petitioner to condemn, there must be a change in the use of the property, and not the mere change of ownership; but, the property sought to be condemned in this case not being devoted to railroad purposes, we see no obstacle in the way of its condemnation by the petitioner for a purpose of that character."

IN RE DIRECTORS OF OLD COLONY R. CO.

(163 Mass. 356.)

Eminent domain—Railroad crossing—Right of land owner to be heard—Construction of statutes. Under the Massachusetts Stat., 1890, chap. 428, the land owner is not entitled to be made a party until after the commissioners have filed their report, and while the court has power to reject the report of the commissioners and determine questions of fact relative to the abolition of the grade crossing, it has no power to revise or change such report.

KNOWLTON, J.

Sec. 224. Statement of the case—Statutory provisions. The justice of the superior court, by his report, presents two questions—First, whether Katherine C. Lefstrom, the petitioner for a modification of the report of the commissioners, is entitled, as a matter of right, before confirmation of the decision of the commissioners, to become a party to the suit, and be heard in that court upon the question she raises; and, secondly, whether the court has power to revise the action of the commissioners, and try the question whether more land is taken than is reasonably necessary. If both of these questions are answered in the affirmative, the case is to be remanded for further proceedings; otherwise, her petition is to be dismissed. The questions depend upon the construction to be put upon St. 1890, ch. 428, § 4. The proceedings are under that statute, and the subsequent statutes of 1892, ch. 433, and 1893, ch. 126. By the first mentioned statute the legislature provided for the creation of a tribunal to determine all questions of fact involved in an application for the abolition of a grade crossing, namely, a board of commissioners consisting of three disinterested persons, to be appointed by the superior court. The statute prescribes the duties of these commissioners, and requires that they shall forthwith return their decision into the superior court. “The decree of the court confirming the decision of the commission shall be final and binding.” The sentence last quoted is the only language in the statute which expressly gives the court power to deal in any way with the questions to be considered by the commissioners. This language gives the court power to confirm or reject the report. *Norwood v. Railroad Co.*, 161 Mass. 259 (37 N. E. Rep. 199); *Kingman, Petitioner*, 153 Mass. 566, 579 (27 N. E. Rep. 778; 12 L. R. A. 417), and cases there cited. If there were no such express provision, the general requirement that commissioners be appointed by the court, who are to make a report to the court, would impliedly give the court power to act upon the report. *Boston & Worcester R. R. Co. v. Western R. R.*, 14 Gray 258; *Wrentham v. Norfolk*, 114 Mass. 561; *Wyman v. Eastern R. R.*, 128 Mass. 346.

Sec. 225. Land-owners right to a hearing—Statutory construction. Persons whose land is taken under a

decree of the commissioners are to receive compensation, and, if they fail to agree with the other parties interested in regard to the amount, they are entitled to an assessment by a jury. But such persons have no constitutional right to a hearing upon a question whether their land shall be taken. *Lynch v. Forbes*, 161 Mass. 802 (87 N. E. Rep. 437; 42 Am. St. Rep. 402); *Collins v. Holyoke*, 146 Mass. 298 (15 N. E. Rep. 908); *Brock v. Old Colony Railroad Co.*, 146 Mass. 199 (15 N. E. Rep. 555); *Holt v. City Council of Somerville*, 127 Mass. 408; *Kuschke v. City of St. Paul*, 45 Minn. 225 (47 N. W. Rep. 786). When charters have been granted to railroad corporations in this commonwealth, land-owners along the route have never been made parties to the proceedings for fixing the location; and, under our general railroad law, when the route is to be fixed the only notice required is by publication and posting, which may or may not reach the individual owners whose land is taken. Pub. St., ch. 112, § 89. In reference to the question what land shall be taken, the interest of landowners is to be considered only as they are a part of the public. The interest of every individual is to be regarded, so far as is apparent, in determining what is the interest of the general public. Every public measure which has local features affects the interest of some members of the public more than that of others, and all interests should be weighed, in ascertaining the general interest. Landowners whose property is liable to be taken are not made parties by the statute now before us, and they have no legal right to be heard. Where notice of a hearing is given to the public, they may be heard as a part of the public; and ordinarily, in cases of this kind, a tribunal whose action is liable to affect important interests desires to hear those who will be most affected. In this case it appears that the petitioner, Lefstrom, was fully heard by the commissioners on the question which she now desires to raise before the superior court. She was not an original party to the cause, and has not the rights of a party in any part of the proceedings. But after the commissioners had determined to take her land, and had filed in court their report of their doings, showing a taking of her land, she had an interest different from that of the general public in the question whether their report should be confirmed. The confirmation

of the report, and the recording of it and of the decree of the court in the registry of deeds, would constitute a taking of the land which would be binding upon her. St. 1890, ch. 428, § 4. If there was error in the proceedings of the commissioners, she could not have it corrected by a writ of *certiorari*, as she could if the judgment or decree was by the county commissioners, or some similar tribunal. Her only opportunity to be heard on the question whether the taking of her property by the commissioners was regular and legal was before the court, after the filing of the report. Her interest was such as to entitle her to call in question the legality of their action, and, in a similar case before county commissioners, to prosecute a petition for a writ of *certiorari*. *Powers v. Springfield City Council*, 116 Mass. 84; *Dwight v. Springfield City Council*, 4 Gray 107. We are therefore of the opinion that after the report was filed she had a right to come into court and present objections to the confirmation of the report, and be heard upon them, as she might have filed a petition for a writ of *certiorari* if the taking had been by county commissioners.

Sec. 226. Power of court to revise report of commissioners appointed in a proceeding to abolish a grade crossing. The other question is whether the court has power to revise the action of the commissioners in this particular. Their decision cannot become effective unless it is confirmed by the court. The statute implies that the court will consider the question whether it should be confirmed. It implies that the court will not confirm it if errors of law are apparent in it. If the court has reason to suspect that the report is founded on an error of law, it may inquire into the matter, and take testimony, if necessary, to ascertain whether the suspicion is well founded. If, by reason of a suggestion of one of the parties, or for any other cause, there is reason to believe that the report is founded on an important mistake of fact, or if there seems to have been an irregularity in the proceedings which has affected the report, the court may properly recommit it, that the error may be corrected. In case of misconduct of the commissioners, or gross error, or refusal to regard the direction of the court to correct an error of law, we have no doubt of the power of the court to reject the report, revoke

their appointment, and appoint other commissioners. On the other hand, the commissioners constitute a tribunal which is finally to decide the matters of fact on which alone the abolition of a grade crossing can be ordered. *Com. v. Westborough*, 3 Mass. 406; *Kingman v. Commissioners*, 6 Cush. 806; *Thorpe v. Commissioners*, 9 Gray 57. The court has no power to revise their report, and order a change to be made, otherwise than as they finally recommend. So long as they keep within the authority conferred by the statute to act under the petition, and in the proceedings which determine their jurisdiction, the court has no power to substitute its opinion for theirs. In *Norwood v. Railroad Co.*, 161 Mass. 259 (37 N. E. Rep. 199), this court has held that upon the facts before the superior court, on which, presumably, the decision of that court was founded, there was error of law in the construction of the statute. It has never been intimated that in a case of this kind the court can take the report of the commissioners, and, on hearing evidence, amend it into a new report, and order a change of a crossing to be made in a mode different from that adopted by the commissioners. In the present case it does not appear that the action of the commissioners was outside of the jurisdiction conferred by their appointment, under the statute, or that they erred in any matter of law, and it does not appear that they fully heard and considered the questions presented to the superior court by the petitioner, Lefstrom. The question whether a few feet, more or less, of land, should be taken at a particular point for the convenient construction of the work, was one which the legislature intended to submit to their decision. We are of opinion that the matters which the petitioner Lefstrom offered to prove related to facts passed upon by the commissioners, in regard to which, in the absence of irregularity of procedure, or gross error, their decision was final, and that, therefore, upon these offers of proof, the court has no power to revise their action. Petition dismissed.

Note. On the subject of parties, pleading and practice in condemnation proceedings and construction of statutes, see *Ballards' Annual* Vol. 1, § 517, Vol. 2, §§ 208, 209, Vol. 3, §§ 275-282, 671-673.

CATER v. NORTHWESTERN TEL. EXCH. CO.

(60 Minn. 539.)

Additional servitude—Telephone line upon a highway. The defendant, under legislative authority (Gen. St. 1894, § 2641), constructed along the side of a country highway (the fee of which was in plaintiff) a telephone line, consisting of poles planted in the ground upon which wires were strung. It did not interfere with the safety and convenience of ordinary travel, or unreasonably or materially impair plaintiff's special easements in the highway as owner of the abutting land. Held, that it did not impose an additional servitude upon the highway. Start, C. J., and Buck, J., dissenting.

(Syllabus by the Court.)

MITCHELL, J.

Sec. 227. Statement of the case. The defendant is a domestic corporation authorized to erect and maintain telephone exchanges and lines. It has constructed a telephone line between the cities of Minneapolis and St. Cloud, a part of which is on and along the side of a rural highway, the fee of which, subject to the public easement, is in the plaintiff, who is the owner of the abutting land. It was built without his consent and against his protest. It consists of poles planted in the soil at a distance of one hundred seventy feet from each other, upon which wires are stretched. The defendant claims the right to construct and maintain this line solely by virtue of Gen. St. 1894, § 2641. This action was brought to compel the defendant to remove its poles and wires from the highway. It is not claimed that the line is not constructed in strict accordance with the requirements of the statute. Neither did the plaintiff either allege or prove that it has caused any substantial pecuniary damage or injury to himself or his property. He plants himself squarely upon the proposition that the erection and maintenance of telephone poles and wires is not within the public easement in a highway, but constitutes the imposition of an additional servitude upon his land; and that is the question presented by this appeal. The question is *res integra* in this state, and the decisions in other states upon it, as well as upon the kindred one as to telegraph lines, are conflicting. Hence we feel at liberty to decide the question entirely upon principle.

Sec. 228. As to the nature and extent of the public easement in a highway. From the manner in which the case has been discussed by counsel, we assume that defendant's telephone line is for the use of the public upon payment of certain charges. Therefore, the use to which the highway has been appropriated by the defendant is a public one. The transmission of intelligence by telegraph or telephone is a business of a public character, to be conducted under public control, in the same manner as the transportation of persons or property by common carriers. But, of course, the fact that this is a public use gives the legislature no right to authorize the taking of private property for it without paying compensation. The proposition is equally elementary that the acquisition by the public of one easement in land gives no right to another and different easement. The public can not go beyond, but must be confined within, the general purpose for which the easement was granted or acquired from the owner of the soil. Hence, whether an easement authorizes the use of land in a particular way depends upon the nature and extent of the easement. These propositions are so nearly axiomatic that they will not be disputed by any one. The question, then, is, what is the nature and extent of the public easement in a highway? If there is any one fact established in the history of society and of the law itself, it is that the mode of exercising this easement is expansive, developing and growing as civilization advances. In the most primitive state of society the conception of a highway was merely a foot-path; in a slightly more advanced state it included the idea of a way for pack animals; and, next, a way for vehicles drawn by animals — constituting, respectively, the *iter*, the *actus*, and the *via* of the Romans. And thus the method of using public highways expanded with the growth of civilization, until to-day our urban highways are devoted to a variety of uses not known in former times, and never dreamed of by the owners of the soil when the public easement was acquired. Hence, it has become settled law that the easement is not limited to the particular methods of use in vogue when the easement was acquired, but includes all new and improved methods, the utility and general convenience of which may afterwards be discovered and developed in aid of the general purpose for which

highways are designed. And it is not material that these new and improved methods of use were not contemplated by the owner of the land when the easement was acquired, and are more onerous to him than those then in use. Another proposition, which we believe to be sound, is that the public easement in a highway is not limited to travel or transportation of persons or property in movable vehicles. This is, doubtless, the principal and most necessary use of highways, and in a less advanced state of society was the only known use, as the etymology of the word "way" indicates. And the courts, which, as a rule, are exceedingly conservative in following old definitions, have often seemed inclined to adhere to this original conception of the purpose of a highway, and to exclude every form of use that does not strictly come within it. But it is now universally conceded that urban highways may be used for constructing sewers and laying pipes for the transmission of gas, water, and the like, for public use. Some courts put this on the ground that these uses are merely incidental to and in aid of travel on the streets. Other courts put it on the ground that such uses are contemplated when the easement in urban ways is acquired, but not in the case of rural highways. But it seems to us that neither of these reasons is either correct or satisfactory. The uses referred to of urban streets are not in aid of travel, but are themselves independent and primary uses, although all within the general purpose for which highways are designed. Neither can a distinction between urban and rural ways be sustained on the ground that such uses were contemplated when the public easement was acquired in the former, but not when the easement was acquired in the latter. As a matter of fact, most of these uses were unknown when the public easement was acquired in many of the streets in the older cities. Indeed, many of what are now urban highways were merely country roads when the public acquired its easement in them, and doubtless many highways that are now merely country roads will in time become urban streets. When such changes occur, will the abutting owners be entitled to new compensation before the public can build sewers or lay water or gas pipes in these streets?

It seems to us that a limitation of the public easement in

highways to travel and the transportation of persons and property in movable vehicles is too narrow. In our judgment public highways, whether urban or rural, are designed as avenues of communication; and, in the original conception if a highway was limited to travel and transportation of property in movable vehicles, it was because these were the only modes of communication then known; that, as civilization advanced, and new and improved methods of communication and transportation were developed, these are all in aid of and within the general purpose for which highways are designed. Whether it be travel, the transportation of persons and property, or the transmission of intelligence, and whether accomplished by old methods or by new ones, they are all included within the public "highway easement," and impose no additional servitude on the land, provided they are not inconsistent with the reasonably safe and practical use of the highway in other and usual and necessary modes, and provided they do not unreasonably impair the special easements of abutting owners in the street for purposes of access, light, and air. It is impracticable, as well as dangerous, to attempt to lay down, except in this general form, any rule or test of universal application as to what is or what is not a legitimate "street or highway use." Courts have often attempted to do so, but have always been compelled by the logic of events to shift their grounds. The only safe way is to keep in mind the general purpose of highways, and adopt a gradual process of inclusion and exclusion as the cases arise. This court has held, in common with the great majority of courts, that an ordinary commercial railroad imposes an additional servitude on a street, and we applied a test as to what did and did not constitute an additional servitude. As far as it went, and as applied to such a case, the test was doubtless correct; but, after all, the bottom fact upon which the decision really rests was that such an appropriation of a street was practically subversive of its use by the public in the ordinary way, and also unreasonably impaired the special easements of abutting owners. So, too, the New York elevated railway cases were discussed and reasoned at great length; but in their final analysis the real ground upon which those structures were held to impose an additional servitude was, not that they were

immovable, or were above the surface of the ground, but because they unreasonably impaired the easements of abutting owners in the streets for the purpose of access, light and air. How far a particular method of using a street must interfere with other methods of its use by the public, or with the special easements of abutting owners, in order to constitute an additional servitude or amount to a nuisance, is not involved in the present case. An argument sometimes advanced why telegraph and telephone lines constitute an additional servitude is that the structures are immovable. It is said that "the primary law of the street is motion." It is true, motion is the law of the street, in the sense that the person or thing to be transmitted or transported must move; but it is not true in the sense that the medium or agency by or through which it is conveyed or transmitted must move. Pipes laid for the transmission of water, gas and steam are immovable. So are the tracks of street railways, also the poles and wires of the trolley system. And it can make no difference in principle whether the immovable structure is on, under or above the surface of the ground, for the rights of the owner of the fee are the same in either case. Subject only to the public easement for highway purposes, he remains the owner of the land upward and downward indefinitely. If the transmission of intelligence by telegraph and telephone is not included in the public easement in a highway, it would be equally an invasion of his right of property, even if the wires were placed under ground. If an immovable structure in a highway constitutes an additional servitude, it is not merely because it is immovable, but because it unreasonably interferes with the general use of the street by the public, or because it unreasonably impairs the special easement of abutting owners."

Sec. 229. Same—Telephone line not an additional burden. It can hardly be necessary to say that the fact that telephone and telegraph lines are owned by private companies, and not by the state, is not material, provided they are authorized by the state, and are devoted to a public use. No such structures can be put in the highways except by authority of the state, and then only for a public use. The state can say how they shall be constructed and operated. When public

interests demand, the state can require the wire to be put under ground, as they, doubtless, should be in cities of any considerable size. So far as there is any distinction between rural and urban highways, there would be much more reason for holding such structures an additional servitude in the latter than in the former. It is a matter of common knowledge that telegraph and telephone lines along the side of a country road rarely, if ever, appreciably interfere with either public travel or the easements of the abutting landowner; whereas in the cities, especially on business streets, where the buildings extend out to the line of the street, the numerous wires stretched upon the crossarms frequently materially interfere with access, light, and air, as well as render protection of the other buildings more difficult in case of fire. There is a further consideration that is entitled to weight. We cannot pretend ignorance of the fact that in this state, from the earliest times, the right to appropriate highways for telegraph lines has been asserted, and almost universally acquiesced in by the owners of abutting estates. The legislature has for nearly thirty years assumed that this right existed, by enacting a statute authorizing it. In 1881, when the newer invention of telephones was coming into general use, the legislature amended the statute extending the same right to telephone companies. This has also been generally acquiesced in by the public. This constitutes a popular construction of "the law of the road," and a popular verdict as to what public convenience requires, which courts can hardly afford to ignore. The telephone is still a comparatively new invention. Notwithstanding the high charges for its use which the proprietors of the patents have been enabled to exact, it has already become a common medium of communication, not only between residents of the same city, but also between neighboring towns and villages, and with the development of the long distance telephone, even between towns and cities hundreds of miles apart. With the expiration of the patents, the charges for its use are now being rapidly reduced. The present possibilities of the telephone as a means of communication are very great. It is not impossible that it may soon become a common and cheap mode of communication, not merely between towns, but also between residents of the country and of the towns, or even between the rural

residents themselves. It may be, as advocated by many as to telegraphs, that the government will at some day assume the function of furnishing all such service to the public. Telephone lines must be placed in the highways. It is the only practicable place to put them. The only question is whether a new right to do so must be acquired from the owners of property abutting on the highways. We are not unmindful that private property cannot be taken for a public use without compensation, however important that public use is. We are not forgetful of the fact that care should be taken that, in the popular zeal for modern public improvements, the burden of furnishing these improvements should not be shifted from the public, and imposed upon any particular class of individuals. But viewing, as we do, highways as being designed as public avenues of travel, traffic, and communication, the use of which is not necessarily limited to travel and the transportation of property in moving vehicles, but extends as well to communication by the transmission of intelligence, it seems to us that such a use of a highway is within the general purpose for which highways are designed, and, within the limitations which we have suggested, does not impose an additional servitude upon the land; in short, that it is merely a newly-discovered method of using the old public easement. We have thus far referred to the appropriation of highways for telegraphs and for telephones as if both stood on the same ground, and involved the same principle. But the only question before us is whether a telephone line imposes an additional servitude on a highway; and the decision of the court must be deemed to be confined to that question, leaving the question as to telegraph lines to be authoritatively decided when it is presented and argued, so that, if there be any distinction between the two, an opportunity may be given to point it out. Order affirmed.

Dissenting Opinion.

START, C. J.

Sec. 280. Uses to which a highway may be put—
Authorities collated. I dissent. The *locus in quo* in this case is a country highway, the title in fee of which, subject to the public easement, is in the appellant. The respondent is a corporation of this state, and, as such, authorized to erect and

maintain telephone exchanges and lines. It has constructed and operates such a line between the cities of Minneapolis and St. Cloud, and in so doing, without the consent and against the protest of the appellant, it entered upon the highway in question, and erected and now maintains poles, planted in the soil thereof, and upon them stretched the wires used for its telephone line. The respondent claims the right to so erect and maintain the poles and wires in this highway without compensation to appellant, by virtue of legislative authority. Gen. St. 1894, § 2641. Whether or not his claim is valid depends upon what answer shall be given to the question, is the erection and maintenance, under legislative authority, of poles and wires in a rural highway, for a telephone line, an additional servitude, for which the abutting landowner is entitled to compensation? An answer to this question involves a consideration of the purposes for which a highway in the country, in this state, is acquired. Is the right to establish and operate telephone lines therein, under legislative authority, included by implication in such purposes? If such use of the highway is outside of the scope of the public easement therein, then it is an additional servitude, for which the owner of the soil has never been compensated, and the legislature cannot authorize such use except upon condition that compensation be made to the owner. A highway primarily is simply a public easement or servitude, for travel and passage of persons, animals, and things, carrying with it, as an incident, the right of the public to use the soil, for the purpose of the repair and improvement of the way, and, in cities and populous places, the further right to use the street for the more general purposes of sewerage, the distribution of water and light, and the furtherance of public health, safety and convenience. The owner of the land over which the highway passes retains the fee thereof and all rights of property therein not incompatible with the public easement therein, as here defined. 2 Dill. Mun. Corp., § 688; Ang. & D. Highw., § 801. While the fundamental idea of a highway is that it is for public travel, yet the purposes for which it was acquired are not limited to travel and passage in the then known vehicles and methods, for all new vehicles and methods of travel thereon, which are not inconsistent with the safe and practical use of the high-

way for travel in the ordinary methods, are included in the public easement. Accordingly, it has been held by nearly all recent authorities that the operation of a street railway for the transportation of persons only, whether the motive power is animal or mechanical, including electricity, with the necessary poles and wires to communicate the power to the car or vehicle to be moved, is not an additional servitude. *Taggart v. Railway Co.*, 16 R. I. 668 (19 Atl. Rep. 326; 7 L. R. A. 205); *Halsey v. Railway Co.*, 47 N. J. Eq. 308 (20 Atl. Rep. 859). The authorities, in reference to such street railways, proceed upon the basis that such new use of the street is similar to that for which the street was originally acquired; or, in other words, it is merely a newly-discovered method of exercising the old public easement, for travel and passage of persons and things along the public street. This principle has been extended, by a limited number of adjudged cases, to the erection and use of telephone and telegraph poles and wires in the streets, for the purpose of transmitting intelligence. The analogy, however, between a telephone line and the purposes for which a country highway is acquired is remote, if not fanciful; and it is safe to say that such use of the highway was not within the contemplation of the parties when the damages for the public easement were assessed or the right of passage dedicated. The use of a highway for a telephone line is essentially distinct from its use for travel. The right of the public in the ordinary highway is to pass along upon it, not to remain stationary; and it would be just as reasonable to claim that towers erected in the highway for the purpose of transmitting intelligence by signal-lights were not an additional servitude as to make such a claim for telephone poles. In each case there would be an exclusive use and possession of a portion of the highway, in no manner connected with the movement of vehicles or cars of any kind, which cannot be properly regarded as a new method of exercising the old public easement for travel and passage. The adjudged cases upon this subject are conflicting, but the later cases and the weight of authority sustain the doctrine that a telegraph or telephone line along the highway, where the fee thereof is in the abutting owner, is foreign to its use, and an additional servitude, for which such owner is entitled to compensation; and that the

legislature cannot authorize the imposition of such servitude without also providing for such compensation. *Willis v. Telephone Co.*, 87 Minn. 847 (84 N. W. Rep. 887); *Telegraph Co. v. Barnett*, 107 Ill. 507; *Broome v. Telephone Co.*, 42 N. J. Eq. 141 (7 Atl. Rep. 851); *Telegraph Co. v. Williams*, 86 Va. 696 (11 S. E. Rep. 106); *Stowers v. Cable Co.*, 68 Miss. 559 (9 So. Rep. 856; 12 L. R. A. 864; 24 Am. St. Rep. 290); *Telephone Co. v. Mackenzie*, 74 Md. 86 (21 Atl. Rep. 690, and 28 Am. St. Rep. 219, and notes); *Cable Co. v. Irvine*, 49 Fed. 113; Lewis, Em. Dom., § 181; *Eels v. Telegraph Co.*, 143 N. Y. 188 (88 N. E. Rep. 202; 25 L. R. A. 640); Elliott, Roads & S., 534; Tied. Mun. Corp., § 297. The opposite doctrine is held in the following cases, by a divided court, except in the last case cited, and in that one the fee was in the public. *Pierce v. Drew*, 186 Mass. 75 (49 Am. Rep. 7); *Julia Building Ass'n v. Bell Telephone Co.*, 88 Mo. 258 (57 Am. Rep. 898); *People v. Eaton*, 100 Mich. 208 (59 N. W. Rep. 145); *Irwin v. Telephone Co.*, 87 La. Ann. 63. In the first two cases the dissenting opinions are so vigorous as to largely neutralize the decisions as authorities outside of the jurisdiction of the courts announcing them. The latest decision upon this question is that of the New York court of appeals in the case of *Eels v. Telegraph Co.*, which was in all substantial particulars similar to the one at bar. It ably discusses the question on principle, and reaches the unanimous conclusion that the occupation of a rural highway by a telegraph and telephone company for the erection of its poles is an additional servitude, for which the owner of the fee is entitled to compensation. I am of the opinion, upon both principle and authority, that the planting of telephone posts upon a public highway in the country, the fee whereof is in the abutting owner, is an additional servitude, an appropriation of private property, and unlawful as to such owner, unless the right to do so is acquired by contract or condemnation. In reaching this conclusion, I am not unmindful of the fact that the use of the telephone is a beneficial and public use; but private property cannot be taken for public use without compensation first paid or secured, no matter how small its value. This is the constitutional right of the humblest individual, which must not be lost sight of in our enthusiasm over

the public benefits conferred by the telegraph and telephone, or in our desire to promote the public welfare.

Dissenting Opinion.

BUCK, J.

Sec. 231. Abutting owner's right to compensation upon a new use being made of the highway — Review of the authorities. I also dissent from the opinion of the majority of the court, and, while it is perhaps unnecessary for me to say anything in addition to what is said by the Chief Justice, yet the importance of the question involved may justify me in stating my own views on the subject. There are several methods by which a highway may be established; for instance, by condemnation, dedication, and by prescription. In the case of condemnation, damages are usually assessed by way of compensation for the injury sustained. But, in case of dedication and prescription, damages are not assessed, although in law all of these methods are equally effective. Yet, as in cases of prescription, where a man's property is secured for public use without compensation, there should not be added to such property a greater burden than was contemplated by the owner when he suffered his rights in the premises to become inferior to those of the public. It is a well-established rule of law that the owner of land burdened with a highway has all of the rights of the soil, not inconsistent with its use for public purposes and for which it was originally established. The title to the soil remains in the owner, and any interference with it by any one to the injury of the owner, and not consistent with the purpose for which it was originally established, renders the person so interfering, liable in damages. The constitutional provisions, so familiar to all, that private property shall not be taken for public use, without just compensation, first paid or secured, ought to stand as a continual barrier against all wrongful encroachments upon private rights. The aggregate of the private rights injuriously affected by the majority opinion, in this state, is very great, possibly greater than those which will be benefited by the result of that opinion. The owners of urban, suburban and rural property are very numerous, and must necessarily be thus seriously affected in many instances. Now, a public

highway is established for an uninterrupted passage for animals and vehicles, and to allow persons to pass and repass, to go and return, at their pleasure and without interruption. It is an easement which the public have in the land, with the incidental right on the part of the public authorities to keep it in repair. The damages are accepted by the owner with the understanding that it is for this purpose that the highway is established. Or, if the highway is established by dedication of user, the same implication would arise. Now, is the erection of telephone poles in a street or highway, with its numerous wires connecting the poles upon crossbars, an entirely new use of the highway, and an additional burden to the owner, for which additional compensation should be provided, or is it a mere modification of the public servitude? If it is a change wholly foreign to the ordinary purposes of a highway, then the adjoining owner is entitled to compensation. Dillon on Municipal Corporations (volume 2, § 678a) says: "On the whole, the safer and sounder view is that such use of the street or highway, attended, as it may be, especially in the cities, with serious damage and inconvenience to the abutting owner, is not a street or highway use proper, and hence entitles such owner to compensation for such use, or for any actual injury to his property caused by poles and lines of wires placed in front thereof." In the prevailing opinion in this case it is said that, "if there is any one fact established in the history of society and of the law itself, it is that the mode of exercising this easement is expansive, developing, and growing as civilization advances." If by this it is meant that certain changed conditions may arise, which, for the first time, demand the application of the common law to such changed conditions, the statement may be correct; but the law itself always existed, although it may never before have been applied or called into actual operation, and especially so as to establish a precedent. Public sentiment may change, and the onward spirit of the time demand that it shall have its way, but the well-established principles of the common law are unchangeable, and the private right which existed fifty, one hundred or one thousand years ago should now be as sacred and inviolate as then. The current of public sentiment, changing though it may, does not create new rights; and

while it does, step by step, insiduously attempt to appropriate private property for new uses, it should not be granted success, under the guise of great public benefit, to the injury of the individual. And while we speak of private or individual rights in this case, where only one individual's rights are to be determined, yet, in a broader sense, a great body of the public may be seriously affected by it, who are remediless under the rule laid down in the majority opinion.

Now, a new use, even if beneficial to the public, does not necessarily create a new right as against the owner of the land. The primary question is, does it constitute an essential change, so as to create an additional burden? If so, then it is immaterial how beneficial the new and improved methods of public travel or the transmission of intelligence by telegraph or telephone, or whether the business is to be conducted under public control. It is also quite immaterial that the erection of these telephone poles was authorized by a legislative enactment. It needs something more than a legislative consent to deprive a man of his property or prevent his absolute control of it. The state itself would have just as much right to erect telephone poles in the highway as to authorize any corporation or private person to do so, and in neither case should it be permitted without compensation. Such an appropriation of the streets is destructive of the ordinary use as public ways, and inconsistent with the purpose for which they were originally established. In the case of *Eels v. Telegraph Co.*, 143 N. Y. 133 (38 N. E. Rep. 202; 25 L. R. A. 640), Justice Peckham, speaking of certain prior decisions of the New York circuit court of appeals, said: "They show that the primary or fundamental idea of a highway is that it is a place for uninterrupted passage by men, animals, or vehicles, and a place by which to afford light, air, and access to the property of abutting owners, who in this respect enjoy a greater interest in the street than the general public, even though their title to the land stops with the exterior line of the street. It is not a place which can be permanently and exclusively appropriated to the use of any person or corporation, no matter what the business or object of the latter might be. It was because the highway was permanently and to some extent exclusively appropriated by the elevated railroads that it was held that their erection

without the consent of the abutting owners was illegal." This was said of the streets in New York City, where the title of the streets is in the city. It seems to me that this rule can be applied in this state with much greater force, where the fee in the street is in the abutting owner. The principle announced in the majority opinion would, of course, apply to our large and populous cities, as well as to rural property. It is a well-known fact that the streets in our cities are lined with these telegraph and telephone poles, covered with crossbars, and strung with numerous wires, making these erections in some respects dangerous, and interfering with the free and convenient use of the property. If one person or company can do this, another one may do the same. The mere fact that the owner may have access to his abutting property because there is a sufficient space left between those poles for him to pass is certainly a poor justification for creating an additional burden upon his property, without giving him any remedy for damages. In large cities these numerous erections may exclude light and air, besides being an inconvenience in the use of the street, and a nuisance in several other respects. And the erections are not to be temporary, but permanent, continuous, and excluding the use by the public of that portion of the highway occupied by them. Such an exclusive use of a portion of the highway, whether old or new, it seems to me, is not included within the public highway easement. If telegraph and telephone poles two feet in diameter, and thirty or forty feet high, covered with crossbars and numerous wires strung from one pole to another, erected in the highway in front of a man's residence or business property, can be there permanently maintained, why cannot a guard house be erected there also as a permanent structure, upon the ground that the poles and wires need protection against depredators or injury? The erection of telegraph and telephone poles is not merely a new method of exercising old rights, but the addition of a new servitude and essentially a new burden upon the street. Viewed in this light, if the necessities or luxuries of modern life are needed, let those who seek their enjoyment and benefit pay for them, and not secure them at the expense of additional burdens imposed upon private property. It is this compulsory yielding up of private rights and private property to

concentrated power and wealth in the hands of a few, under the demands of a so-called "progressive civilization," that needs judicial care and its conservative force to see that no new appropriation of lands not embraced in the original dedication or condemnation shall be permitted. If the erection of telephone and telegraph poles in our public streets and highways is simply a new and improved method of the use of the street, I fail to see why any legislative permission was necessary, because the telephone company would in such case have the same right to the use of the street as any traveler thereon. But suppose the right to erect these electrical lines was included in the original establishment of the public streets and highways; yet it must be conceded that they do constitute damages in a greater or less degree, and, in condemnation cases, must the municipalities pay the abutting owner for such damages? By what constitutional provision or statutory law are municipal corporations authorized to levy a tax to pay the damages for a private individual or a corporation to erect these poles and carry on the telephone or telegraph business? I assume that no such right exists, and shall we not in the coming time be met with this serious question of whether, upon the exercise of the power of eminent domain by condemnation proceedings, the possible or probable erection of such poles will not constitute an element of damage, to be assessed and paid by the people to the abutting owner before his property can be taken for public use? And in such case will not further complications arise in case of the vacation of the streets or highways where these erections have been made? The great weight of authorities is against the view of the majority of this court, and the late decisions of eminent courts are in accordance with the views which I have endeavored to express.

Sec. 232. As to what is an additional servitude on a rural highway. Telephone and telegraph lines. Upon the exact question presented in this case the supreme court of New York, in a recent and well considered opinion, unanimously reached just the opposite conclusion. *Eels v. American Telephone & Telegraph Co.*, 143 N. Y. 133 (38 N. E. Rep. 202; 25 L. R. A. 640). The court say: "We cannot agree that this permanent appropriation and exclusive possession of a small portion of the highway can properly be regarded as any newly-discovered method of exercising the old public

easement, for the very reason that this so-called 'new method' is a permanent, continuous, and exclusive use and possession of some part of the public highway itself, and therefore cannot be simply a new method of exercising such old public easement. It is a totally distinct and different kind of use from any heretofore known. It is not a mere difference in the kind of vehicle, or in their number or capacity, or in the manner, method, or means of locomotion. All these might be varied, increased as to number, capacity, or form, altered as to means or rapidity of locomotion, or transformed in their nature and character, and still the use of the highway might be substantially the same—a highway for passage and motion of some sort. Here, however, in the use of the highway by the defendant is the fact of permanent and exclusive appropriation and possession, a fact which is, as it seems to us, wholly at war with that of the legitimate public easement in a highway. * * * The argument is pressed upon us that the question to be decided in this case is new, and that it ought to be decided with reference to the wants and customs of the advancing civilization, which it is alleged is doing so much to render life more comfortable, attractive, and beautiful. Courts are frequently addressed with such arguments, which are quite forcible, and have in this case been very eloquently, plausibly and aptly advanced. The answer to be made is that, although this particular phase of the question, strictly speaking, may itself be new, yet the principle which governs our decision is as old almost as the common law itself; and in deciding this appeal favorably to the defendant herein we should be overturning and making nothing of cases which have been regarded as the law for generations past. A majority of the states whose courts have considered the question have decided it in accordance with our own views." This doctrine is supported by *Chesapeake & P. Tel. Co. v. Mackensie*, 74 Md. 38 (21 Atl. Rep. 690; 28 Am. St. Rep. 219); *Western Union Tel. Co. v. Williams*, 86 Va. 696 (11 S. E. Rep. 106; 8 L. R. A. 429); *Am. Tel. & Tel. Co. v. Smith*, 71 Md. 535 (18 Atl. Rep. 910; 7 L. R. A. 200); *Board of Trade Tel. Co. v. Barnett*, 107 Ill. 507 (47 Am. Rep. 458).

It has been held that a telegraph line upon a street in a city is an additional burden. *Stowers v. Postal Telegraph-Cable Co.*, 68 Miss. 559 (9 So. Rep. 356; 24 Am. St. Rep. 290; 10 L. R. A. 864). The court say: "There is some conflict in the authorities, but the decided weight is to the effect that telegraph lines form no part of the equipment of a public street, but are foreign to its use, and that where the abutting owner is the owner of the fee to the center of the street he is entitled to additional compensation for the additional burden placed upon his land." Citing, *Lewis, Em. Dom.*, § 131, citing *Telegraph Co. v. Barnett*, 107 Ill. 507; *Dunesbury v. Telegraph Co.*, 11 Abb. N. C. 440; *Metropolitan Tel. Co. v. Colwell Lead Co.* 50 N. Y. Super. Ct. 428; *Tiffany v. Illuminating Co.*, 51 N. Y. Super. Ct. 280; *Broome v. Telegraph Co.*, 42 N. J. Eq. 141 (7 Atl. Rep. 851); Contra, *Hewett v. Telegraph Co.*, 4 Mackey, 424; *Pierce v. Drew*, 136 Mass. 75 (49 Am. Rep. 7); *Building Ass'n v. Bell Tel. Co.*, 88 Mo. 258. It is held that the rights of a telephone company are subordinate to those of an electric street car company on the ground that travel is the dominant purpose of the street: and that

the fact that a telephone company acquired and entered upon the exercise of a franchise to erect and maintain its telephone poles and wires upon the streets of a city prior to the operation of an electric railway thereon, will not give the telephone company, in the use of the streets, a right paramount to the easement of the public to adopt and use the best and most approved mode of travel thereon; and, if the operation of the street railway by electricity as the motive power tends to disturb the working of the telephone system, the remedy of the telephone company will be to readjust its methods to meet the condition created by the introduction of electro-motive power upon the street railway. *Cincinnati Inclined Plane Ry. Co. v. City & Suburban Tel. Ass'n*, 48 Ohio St. 390 (27 N. E. Rep. 890; 12 L. R. A. 534; 29 Am. St. Rep. 559).

It is held that an electric light pole erected in an alley, the fee of which is in the public, is not such an additional burden as will entitle the abutting owner to any relief. *Loeber v. Butte Gen. Elec. Co.*, 16 Mont. 1 (39 Pac. Rep. 912; 50 Am. St. Rep. 468). It is held that the construction and maintenance of a sewer under a public highway does not impose an additional servitude. *Chelsea Dye-House & L. Co. v. Commonwealth*, 164 Mass. 350 (41 N. E. Rep. 649); *Lincoln v. Commonwealth*, 164 Mass. 1 (41 N. E. Rep. 112).

Sec. 233. Additional burden—Gas mains on highway. The Indiana Statute, Acts 1889, p. 24, does not authorize a gas company to lay its pipes along the highway without the consent of the abutting owner, and where it is so laid without his consent he may remove it. *Consumers' Gas Trust v. Huntsinger*, Ind. App. (39 N. E. Rep. 423). The court say: "It is well settled in this jurisdiction that the owner of land abutting on a public highway is the owner of the fee to the middle of such highway, and that the right of the public is simply an easement affording passage over and along the same. *Halsett v. Railroad Co.*, 7 Ind. App. 603 (34 N. E. Rep. 845), and cases cited. It is equally well settled that such abutting owner has a special proprietary right in the highway, separate and distinct from that of the general public, and that this right cannot be taken or impaired without compensation. *Haslett v. Railroad Co.*, *supra*. And this right the legislature cannot take away except to permit its appropriation to a public use, and then only on the payment of compensation. *Lostutter v. City of Aurora*, 126 Ind. 436 (26 N. E. Rep. 184; 12 L. R. A. 259); and cases cited. * * * While the rights of the public are paramount to those of an individual, the constitution affords the latter protection, in that his property shall not be taken even for the public good except he be compensated therefor. The easement for road purposes which grants to the general public the right to pass and repass over a man's land does not carry with it a right to use it for other purposes not legitimately connected with the use of highways. The building of a pipe line along a highway does not come within the uses for which highways were intended. It has been decided by our supreme court, following the decisions of other courts of last resort, that the laying of gas pipes along the highway is the imposition of an addi-

tional burden upon the fee from that embraced in the easement for road purposes, and that compensation must be made to the owner of the fee. *Kincaid v. Gas Co.*, 124 Ind. 577 (24 N. E. Rep. 1066; 8 L. R. A. 602; 19 Am. St. Rep. 113)." The public have the right to the free and unobstructed use of the highway "from fence to fence" and the laying of gas pipes along such highway without permission from the proper authorities is an unlawful act. *Lebanon Light, H. & P. Co., v. Leap*, 139 Ind. 443 (39 N. E. Rep. 57; 29 L. R. A. 342).

Sec. 234. Additional burden—Electric street railway. It is held that an electric street railway is not an additional burden. *Limburger v. San Antonio R. T. St. Ry. Co.*, 88 Tex. 79 (30 S. W. Rep. 533). The court say: "The construction and operation of an ordinary steam railway upon a street is generally regarded by the courts as an appropriation of such street to a different purpose from that for which it was originally dedicated. Such railways are maintained for the purpose of transporting passengers and freight between distant points; and, from the nature of their construction and their mode of operation, they monopolize, in part, the use of the streets as a highway, and obstruct their enjoyment for the purposes for which they were originally established. It is not so as the courts hold, with a street railway. If properly constructed, their tracks constitute no serious impediment to the legitimate use of the thoroughfare. Its cars interfere with travel, but so do omnibuses, carriages and other vehicles used for the transport of passengers. Street railways facilitate the passage of persons from one part of the city to another; and this is one of the objects for which streets are opened and maintained. It is therefore argued that, although street railways may have been unknown at the time a street was dedicated, it does not follow that a use of the streets by such a railway is not a use in pursuance of the original purpose contemplated in laying out the highway. Why an electric road should be a burden, and a horse railroad should not, we are unable to see. The electric car, as was pointed out in the opinion of the court in the Michigan case cited above, does 'not occupy as much space on the street as does the car with horses attached.' We may assume that they are capable of being run at a much greater speed than a horse car; and the greater rapidity of motion may render them more dangerous. But the increased rate of speed is not necessarily inherent in the system, and so far as we can see, they may be operated as slowly and as safely as other cars. The right to construct and operate a line of electric railway does not confer a right unnecessarily to endanger persons or property; and, if the cars of a company operating such a road are propelled at a dangerous rate of speed, it would be responsible to all persons who may be injuriously affected, either in person or property, by such improper operation." The doctrine in this case is supported by *Cumberland Telegraph & Telephone Co. v. United Electric Co.*, 93 Tenn. 492 (29 S. W. Rep. 104; 27 L. R. A. 236). Citing, *Taggart v. Railway Co.*, 16 R. I. 668 (19 Atl. Rep. 326; 7 L. R. A. 205); *Halsey v. Railway Co.*, 47 N. J. Eq. 380 (20 Atl. Rep. 859); *Railway Co. v. Winslow*, 3 Ohio Cir. Ct. 425;

Railway v. Mills, 85 Mich. 634 (48 N. W. Rep. 1007); *Cincinnati Inclined Plane Ry. Co. v. City & Suburban Tel. Ass'n*, 48 Ohio St. 390 (27 N. E. Rep. 890; 12 L. R. A. 534; 29 Am. St. Rep. 559); *Lockhart v. Railway Co.*, 139 Pa. St. 419 (21 Atl. Rep. 26); *Rafferty v. Traction Co.*, 147 Pa. 579 (6 Am. Ry. & Corp. Rep. 335; 23 Atl. Rep. 884; 90 Am. St. Rep. 763).

EPITOME OF CASES.

Sec. 235. As to what property is subject to. Private corporations organized and establishing plants for the purpose of supplying a city with water are subject under the statute to the exercise of the right or power of eminent domain, and cities in which they are located may, in case of failure to agree upon the consideration to be paid therefor, proceed to condemn such plants, for the purpose of supplying the city with water. *Brady v. Atlantic City*, 58 N. J. Eq. 440 (82 Atl. Rep. 271). It is held that a city may condemn for public use the whole or any part of the right of a private corporation to maintain bridges across a public street, and after condemnation and the payment of adequate compensation, the city may remove bridges erected and by ordinance prevent the erection of others. *Trustees Atlanta Univ. v. Atlanta*, 98 Ga. 468 (21 S. E. Rep. 74). The court say: "There is in no consistency between a grant in its terms perpetual, and a subsequent resumption of the property granted; this resumption being made for public use, and in the exercise of the right of eminent domain. The state itself could not grant an easement which would not be subject to resumption in the exercise of this right, and certainly the city could not. It is no revocation or violation of the grant under which private property is held, to take it for public use, on making adequate compensation to the owner. On the contrary, the proceeding to condemn and take, if it has self-consistency, concedes the sacredness of the grant, and the creation thereby of all the attributes of ownership which can arise by inviolable contract. Reduced to its essence, a constitutional exercise of the right of eminent domain is not deprivation of property, but a compulsory exchange of one kind of property for another, or rather a compulsory sale of property for money—an exchange of equivalent values." Where, by an act of incorporation, the power

to acquire lands by condemnation is conferred upon a company thereby incorporated, subject to a provision that in no case shall it be authorized to condemn or take possession of the land or property of any other corporation, it is held that the restriction upon the power to condemn lands of another corporation is not confined to lands of corporations existing at the passage of the act and that another corporation which acquired lands after the first corporation had filed a survey thereof, according to the requirements of the act but before any petition for the appointment of commissioners had been presented, may claim exemption from condemnation under the proviso. *In re American Transp. & Nav. Co.*, N. J. L.

(32 Atl. Rep. 74). The property of a cemetery association may be taken under the right of eminent domain. *Woodmere Cemetery v. Roulo*, 104 Mich. 595 (62 N. W. Rep. 1010).

Sec. 236. Electric railways—Injury by conduction of electrical current. In a well considered case the authorities are reviewed and it is held that where a previously constructed and operating telephone line is injuriously affected by the conduction of the stronger and irregular currents of electricity from an electric street railway, the latter is liable for damages. *Cumberland Telegraph & Telephone Co. v. United Electric Ry. Co.*, 93 Tenn. 492 (29 S. W. Rep. 104; 27 L. R. A. 286). The court say: "Franchises, easements, and the ability to use property, though intangible, have value, and are, equally with tangible property, entitled to the recognition and protection of the courts. If the plaintiff's claim, that contemplates no more than a lawful and harmless use of its own property, shall be characterized as a demand for the monopoly of the whole earth, what shall be said of defendant's larger demand for a hurtful use, not only of the streets, but of private property for half a mile on either side? The plaintiff's request is: 'Let me alone in that use or application of electricity upon my own premises that causes no harm or disturbance to any one anywhere.' The defendant's command is, 'Get out of my way!' to all feeblar electrical enterprises that may have the misfortune to come within the range of its power. The plaintiff proposes an adjustment of conflicting claims with defendant by the rule embodied in the

enlightened maxim, '*sic utero*,' etc., while defendant insists upon the application of that ruder maxim, 'might makes right.' If defendant could succeed in its construction, there can be little doubt that the unjust rule thus established would some day 'return to plague the inventor.' What protection has this defendant in the enjoyment of its vast properties, if it can be deprived of the power to operate them by some younger, but more robust, child of invention, that shall hereafter obtain mastery in the electric world? Is not the noninjurious use of electricity the only safe and just basis for the adjustment of the conflicting claims of electrical inventions and enterprises? What different basis than this can be arbitrarily established? Where shall the line be drawn between those electrical enterprises that must take care of the artificial currents of electricity generated by them and those that shall not be required to do so? To concede defendant's claim is to give to it an injurious use of plaintiff's property, and at the same time to deny plaintiff the harmless use of its own. The argument that assumes that plaintiff is claiming the whole earth as a return circuit, and therefore appropriating a common right to its exclusive use, because 'plaintiff's portion of the earth cannot be isolated and separated electrically from the balance of the earth,' is one which, if pressed to its logical results, would work a revolution in the law as to the use of the earth, the water, and the air."

Sec. 237. Inconsistent uses—Exclusive possession. It is held that the legislature has power in granting a charter for the construction of a plank road, to make the privilege to construct and operate such road along a highway exclusive; and that the use of such highway by an electric railway for the transportation of persons in cars in consideration of tolls to be paid to the railway company is not consistent with the rights and franchises of the plank road company. *Detroit & B. P. R. Co. v. D. S. Ry. Co.*, 103 Mich. 585 (61 N. W. Rep. 880). Where land is condemned and the compensation paid by a city in order to acquire the land for the protection of its water supply, it thereby acquires the right to the exclusive possession of the surface. *City of Newton v. Perry*, 163 Mass. 819 (89 N. E. Rep. 1032).. As to the title acquired by

condemnation and the use to which the fee may be put, see Ballards' Annual, vol. 1, § 516, and vol. 8, §§ 265, 268, 665.

Sec. 238. As to what is a taking. It is held that the maintenance of a nuisance may amount to a taking of property and that it cannot be legalized by the legislature for private purposes even upon terms of making compensation. *Beach v. Sterling, I. & Z. Co.*, N. J. Eq. (88 Atl. Rep. 286). An appropriation of land for a public highway is a "taking for the use of the state" within the meaning of the constitutional provision that compensation shall be made or secured. *Travis County v. Trogden*, 88 Tex. 802 (81 S. W. Rep. 358). It is held that where a city constructs in its streets an approach to a bridge for the purpose of an over crossing of a railway, and such approach materially obstructs the street, but does not actually encroach upon the abutting lot owners, it is not a taking within the meaning of the constitution, providing that private property shall not be taken for public purposes without compensation. *Home Bldg. & Conv. Co. v. Roanoke*, 91 Va. 52 (20 S. E. Rep. 895; 27 L. R. A. 551). One who uses the waters of a natural pond on his land is held not to be entitled to recover damages for the temporary drying up of the same caused by the constructing of a sewer under the highway, no portion of his land having been actually taken. *Chelsea Dye-House & L. Co. v. Commonwealth*, 164 Mass. 850 (41 N. E. Rep. 649). The passage of an ordinance selecting a particular site for a court house and authorizing a committee to secure it by purchase or condemnation is not a taking, nor even a declaration of intent to take *in invitum* so long as the owner may hold it; and a failure to proceed to acquire title or condemn will not give the owner a right of action for damages. *Shanfelter v. Mayor etc. of Baltimore*, 80 Md. 488 (81 Atl. Rep. 489). The mere location of streets and alleys according to the plan of the city is not a "taking" or "injury" of property. *Busch v. City of McKeesport*, 166 Pa. St. 57 (80 Atl. Rep. 1028). The Mass. Stat. 1890, c. 428, § 5; Stat. 1891, c. 128, § 1, provides: "All damages sustained by any person in his property by the taking of land for, or by alteration of the grade of, a public way
* * * shall primarily be paid by the city or town."

Construing and applying this statute, the authorities are collated and reviewed and it is held by a divided court that one cannot recover for injury to his property by the building of an embankment and bridge by a city on land taken from another, located on the opposite side of the street from his own. *Rand v. City of Boston*, 164 Mass. 354 (41 N. E. Rep. 484).

Sec. 239. Mortgaged lands—Lien holders. Where the mortgagee is not a party to the condemning proceedings and does not lay any claim to the award until it has been paid to the holder of the fee by the officer with whom it has been deposited, such mortgagee cannot recover from the officer with whom the award was deposited. *Armstrong v. Moore*, 1 Kan. App. 450 (40 Pac. Rep. 884). Under the charter of the city of Minneapolis (Sp. Laws 1881, ch. 76, subc. 10), when no appeal has been taken from an order of the city council confirming an award of damages for taking private property for public use, the title to such property vests absolutely in the city for all purposes when the city council appropriates and sets apart in the city treasury the amount of such award. And such appropriation and setting apart operate to divest and release the lien of a mortgage then existing on the property so taken. The amount so appropriated and set apart becomes collateral security for the payment of the mortgage debt, and may be so applied. If, however, the mortgagee resorts to such real estate as remains unaffected by the condemnation proceedings, and thereby, through a foreclosure, satisfies the debt secured, with all costs and charges, his lien upon the amount of the award is terminated. *Boutelle v. City of Minneapolis*, 59 Minn. 493 (61 N. W. Rep. 554). Where a portion of mortgaged land was at the time of the mortgage constructively taken for street purposes and was subsequently sold under foreclosure before the award of damages and after such sale it was actually taken for street purposes, the purchaser at the sale is held to have acquired the right to award. *Magee v. City of Brooklyn*, 144 N. Y. 265 (89 N. E. Rep. 87). As between judgment creditors of, and subsequent purchasers from, the land owner, compensation which has been paid into court in proceedings had after the rendition of the

judgments, the payment having been made after the purchase of the land, such purchaser is entitled to the fund. *Jones v. Miller*, Va. (28 S. E. Rep. 85).

Sec. 240. Compensation before taking. A statute authorizing the taking of private property and providing for compensation only in case application therefor is made by the owner is a violation of the constitutional provision that property shall not be taken or damaged for a public use without just compensation having first been made. *Hayward v. Snohomish County*, 11 Wash. 429 (89 Pac. Rep. 652). The right to enforce payment before taking may be waived by acquiescence. *Kaufman v. Tacoma, O. & G. H. R. Co.*, 11 Wash. St. 632 (40 Pac. Rep. 187). The Montana Const., Art. 8, § 14, provides that "private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner." Under this provision it is held that where a railroad company has instituted proceedings to condemn the right of way and the amount of damages has been fixed by the commissioners duly appointed for this purpose and paid into court for the land owner, his appeal from such award does not prevent the court from granting an order giving the railway possession of the land condemned pending such appeal. *State v. McHatton*, 15 Mont. 159 (88 Pac. Rep. 711). The verdict of a jury, upon an appeal from an award of commissioners, fixing the compensation to be paid to a land owner for the taking of his land by eminent domain, ceases to be a criterion of the value of such land after it has been set aside. The tender to a landowner of the amount of a verdict, which is afterward set aside and the payment thereof into court upon his refusal to accept the same, is not the making of that just compensation which the constitution requires as a prerequisite to the taking of private property for public use, and does not entitle the condemning party to enter upon and take possession of the land which it seeks to acquire. *Pennsylvania R. Co. v. Nat. Docks & N. Y. & C. Ry. Co.*, 58 N. J. Eq. 178 (82 Atl. Rep. 220). For cases which depend upon particular facts and illustrate the right to have compensation, see *Proprietors of Mills v*

Commonwealth, 164 Mass. 227 (41 N. E. Rep. 280); *Dwight Printing Co. v. Boston*, 164 Mass. 247 (41 N. E. Rep. 285).

Sec. 241. Measure of damages. Where land is valuable for either of two purposes and cannot be used for both, the landowner will not be required to elect upon which he will base his claim for damages, but may prove both, and is entitled to receive the highest market price for either; and if the uses are compatible his amount of recovery may be based upon both. *Northern Pac. & M. Ry. Co. v. Forbis*, 15 Mont. 452 (89 Pac. Rep. 571; 48 Am. St. Rep. 692). The filing of a petition to condemn premises described therein as property sought to be taken, is an admission that some valuable interest is to be condemned, and it is error for the court to instruct the jury that "the issue is as to the compensation, if any, which the petitioner should pay." The jury should be told by the court that they are to ascertain the just compensation for the property taken by the proceeding and that they are not to be left free to take the property without making but a mere nominal compensation. *Chicago & N. W. Ry. Co. v. Town of Cicero*, 154 Ill. 656 (89 N. E. Rep. 574); but the rule is different where there is no evidence offered to prove more than nominal damages. *Chicago & N. W. Ry. Co. v. Town of Cicero*, 155 Ill. 51 (89 N. E. Rep. 577). A riparian owner, whose water has been appropriated for public use is entitled to receive damages for being deprived of that portion of the water which he would use and also for being deprived of the opportunity to sell water rights to purchasers of his town lots, together with interest from the time of the taking. *Bridgeman v. Village of Hardwick*, 67 Vt. 658 (32 Atl. Rep. 502). The assessment should not include damages to a parcel of land used for other purposes than the land actually taken and separated from it by a street or highway. *Wellington v. Boston & M. R. R.*, 164 Mass. 380 (41 N. E. Rep. 652). Where the property is not taken, but is simply injured by a public improvement, the measure of damages is the depreciation in the fair market value of the property caused by the construction of the improvement; but loss of rent caused by obstruction of access to the property during the construction of the improvement cannot be included. *Osgood v. City of Chicago*, 154

Ill. 194 (41 N. E. Rep. 40). Where a city which is authorized by law to establish a system of water-works and to maintain the same indefinitely, erects a dam for the purpose of procuring a water supply, a landowner who is injured by the erection of such dam may recover damages both past and prospective. *City of Centralia v. Wright*, 156 Ill. 561 (41 N. E. Rep. 217).

In a recent case the supreme court of Pennsylvania say: "The general principles relating to the exercise of eminent domain, and compensation to be made to those against whom it is directed, are very familiar, though they seem at times to be forgotten. The power to take is a prerogative of the government. It is to be exercised only in the interest of the public. It may be granted to municipal and other corporations to promote such municipal improvements and such business enterprises as are calculated to advance the general welfare. Private interests must give way when the public good requires it, and the power by which this is compelled is that of eminent domain. Its exercise may sometimes involve inconvenience or positive hardship to the private citizen; but it is the state or its grantee that enters, and for a purpose that the government has deemed of sufficient general importance to make such entry justifiable. But the state or its grantee must make "just compensation" for the property taken or destroyed. What is a just compensation in any given case may be said to be a mixed question of law and fact. The law provides a general formula. The jury applies this formula to the facts in each particular case. The just compensation is such a sum as shall equal the difference between the fair market value of the property entered before the entry and after it. What that sum is must be determined by the jury from evidence relating to that subject. If an entire lot is taken, its value at the time of taking determines the amount of the damages. If part only is taken, the jury should ascertain the value of what remains, and the difference between this and the value of the whole before the entry was made fixes the measure of damages. That difference is a "just compensation" to the individual for what has been taken from him for the use or benefit of the public. This rule is easy of statement, and it is within the easy comprehension of laymen who serve as jurors.

It has been laid down in a multitude of cases, and is settled as well as repeated decisions can settle any legal principle." *Spring City Gaslight Co. v. Pa. S. V. R. Co.*, 167 Pa. St. 6 (81 Atl. Rep. 868). For cases which depend upon particular facts and illustrate the measure of damages in condemnation proceedings, see *Manson v. Boston*, 168 Mass. 479 (40 N. E. Rep. 850); *Ligare v. Chicago*, 157 Ill. 686 (41 N. E. Rep. 1021); *Chicago, P. & M. R. Co. v. Goff*, 158 Ill. 458 (41 N. E. Rep. 1112); *National Docks & N. Y. & C. Ry. Co. v. Pennsylvania R. Co.*, 57 N. J. L. 265 (81 Atl. Rep. 462).

Sec. 242. Measure of damages—Improvements. Where a railroad company seeks to condemn land on which its predecessors located tracks and built stone piers for a bridge without consent of the land owner, it is proper to regard such piers as the property of the landowner, appraising them at their market value, if any, and not at their cost. *Pennsylvania P. & B. R. Co. v. Trimmer*, N. J. Eq. (81 Atl. Rep. 810). It is held that when condemnation proceedings are begun the premises may remain in *statu quo* until the proceedings are terminated, and that one who erects a building on land to be taken for a public use after the commencement of such proceedings is only entitled to have his damages assessed as from the time of the institution of the proceedings and without reference to the value of the improvements. *Commonwealth T. Ins. & T. Co. v. Brown*, 166 Pa. St. 477 (81 Atl. Rep. 205).

Sec. 243. Benefits considered—Distinction between taking and injuring. Where land is appropriated for public use, the owner thereof is entitled to recover the value of the land appropriated, without any deduction for benefits. In addition thereto, he should recover any damages sustained by that portion of the land not appropriated, and as against the latter item, special benefits, but not general benefits, may be set off. The foregoing is a rule interpreting that clause of the constitution providing that the property of no person shall be taken or damaged for public use without just compensation therefor, and it is beyond the power of the legislature to change that rule. To constitute an appropriation of land, it is not necessary that the owner be deprived of the fee. Land

is appropriated when it is so taken as to deprive the owner of the use thereof. It is only when the owner is not deprived of the occupancy of the land, but merely suffers an incidental damage thereto, because of the proximity of the improvement, that benefits may be set off against such damage. Therefore, where the petitioner alleged that a county ditch had been constructed through and across the plaintiff's land, and the answer admitted that fact, no payment being pleaded, a verdict allowing the plaintiff no damages is contrary to law. *Martin v. Fillmore Co.*, 44 Neb. 719 (62 N. W. Rep. 868). Where the constitution provides that damages shall be assessed irrespective of benefits, except in the case of municipal corporations, and the city charter provides that benefits arising from the grading or improvement of streets shall be assessed against the contiguous property, a railroad company, which by authority of the city grades a street for the purpose of laying its track, may offset the benefits against the damages resulting to the abutting owners. *Kaufman v. Tacoma, O. & G. H. R. Co.*, 11 Wash. St. 682 (40 Pac. Rep. 187). When land or an easement in land is taken under the right of eminent domain, and damages are to be assessed as a compensation to the owner for the value of the land taken, and the injury, if any, to his remaining land, the owner may put in evidence the reasonable cost of any necessary adaptation of his land to the new state of things produced by the public work, for which his land was taken, if the adaptation and the cost are proper, having reference also to the market value of his own estate. When such damages are to be assessed, if it is contended by the respondent that the damages are offset in whole or in part by some special and peculiar benefit caused to the petitioner's property by the public works for which his land was taken, the fair and reasonable cost to the petitioner of making that special and peculiar benefit practically available is to be taken into account in ascertaining the amount of special and peculiar benefit to be offset, and so may be given in evidence by the petitioner upon the assessment of damages. *Butchers' S. & M. Ass'n v. Commonwealth*, 168 Mass. 886 (40 N. E. Rep. 176).

Sec. 244. Measure of damage—Lands not embraced within the taking but affected thereby—Statutory con-

struction. Mass. Stat. 1889, ch. 439, § 4, requires the commonwealth in proceedings for the establishment of a public sewer to pay "all damages that shall be sustained by any person or corporation by reason of such taking." Under this statute it is held that the fact that the injury complained of by the land owner for the taking of land for a sewer would be a nuisance but for the statute authorizing its construction, does not preclude the owner from proceeding under the statute to obtain his damages and that injury to the land arising from the proximity of the sewer due to the taking of the land, may be considered in determining the owner's damages although a similar injury would not be paid for if no land was taken. *Lincoln v. Commonwealth*, 164 Mass. 868 (41 N. E. Rep. 489). The court say: "When the legislature authorizes something to be done in the neighborhood of a plaintiff's land which diminishes its value, but which would not be actionable at common law if done by a neighboring owner, if the statute provides no compensation, the plaintiff cannot claim any under the constitution, because what is done does not amount to a taking. And even if the thing authorized would be actionable at common law, and a nuisance, but for the statute, still it is not necessarily a taking; and, unless it does amount to that, no compensation can be recovered if the statute does not give it. *Titus v. City of Boston*, 161 Mass. 209 (36 N. E. Rep. 798). See *Bacon v. City of Boston*, 154 Mass. 100, 102 (28 N. E. Rep. 9); *Railway Co. v. Ogilvy*, 2 Macq. H. L. Cas. 229, 285; *Ricket v. Railway Co.*, L. R. 2 H. L. 175, 187. If what is done does amount to a taking, of course, if the statute gives no compensation, an action can be maintained, since the legislature cannot authorize property to be taken without being paid for.

The question what the statute gives compensation for is a matter of construction. But as the phraseology is likely to be somewhat general, it is desirable that a general rule should be applied. Such a rule exists in England, but under our decisions there are difficulties which are mentioned in *Stanwood v. City of Malden*, 157 Mass. 17 (32 N. E. Rep. 702; 16 L. R. A. 591), and *Taft v. Com.*, 158 Mass. 526, 547, 548 (33 N. E. Rep. 1046). In the former of these cases the English rule is stated a little too broadly. 157 Mass. 18 (32 N. E. Rep.

702). One thing seems pretty clear, however, and that is that, if the damages complained of would be a nuisance but for the statute, a court should be more ready to find a remedy under the act than in a case of *damnum absque injuria* at common law. If the nuisance, instead of being a necessary consequence of what the act allows, is a result of mismanagement, the case is different. *Badger v. City of Boston*, 180 Mass. 170.

Statutes like the present, which contemplate a taking of land, generally do not provide for compensation unless there is a taking; and, therefore, in proceedings under the act, some of the plaintiff's land must have been taken, in order to give him a standing in court. Whether this is just or not, so long as it is within the limits of the constitution is not for us to consider. It is enough for us that this condition is generally found in the words of the act. See *Rand v. City of Boston* (decided this day), 164 Mass. 854 (41 N. E. Rep. 484). If, however, a part of the plaintiff's land has been taken, his *locus standi* is established, and the question of construction just referred to, arises — as to what, if any, damages shall be allowed for the harm to his adjoining land. Assuming that none of the damages claimed could be recovered under the act, but for the taking, one naturally asks, why should the taking of adjoining land make a difference? The question has been asked a great many times, and the difficulty will be found forcibly stated by Lord Esher in *Reg. v. Essex*, 17 Q. B. Div. 447, 452. If such a difference is to be made, the foundation for it must be found in the words of the statute. It may be said, to be sure, that the plaintiff gets no more than justice, even if others get less, see *Blesch v. Railway Co.*, 48 Wis. 168, 189 (2 N. W. Rep. 113); *Essex v. Board*, 14 App. Cas. 153, 177; and that when he is compelled to sell the land, we ought to consider all that he naturally would consider in fixing the price for a voluntary sale. A suggestion has been made that the injurious affecting of the plaintiff's land by the use of the land taken, as distinguished from the construction of the works, is a particular injury, different in kind from that which is suffered by the rest of the world. *Id.* 153, 161, 162. But the distinction remains a somewhat arbitrary one. The case in which it was laid down under the English statutes, *In re Stockport, T & A. Ry. Co.*, 33 Law J. Q. B. 251, was crit-

icised often before it finally was accepted, although there is no doubt that now it is settled law. *Reg. v. Essex*, 17 Q. B. Div. 447; *Id.*, *sub nom. Essex v. Board*, 14 App. Cas. 153, 162, 164, 169, 173, 178. And it is to be noticed that Lord Westbury, Lord Bramwell, and some other judges, vainly insisted, with a good deal of energy, that the language of the statute allowed similar compensation when no land was taken, even if, at common law there would have been no right of action. *Rickett v. Railway Co.*, L. R. 2 H. L. 175, 202; *Essex v. Board*, 14 App. Cas. 153, 170 (17 Q. B. Div. 477, 450); *Buccleuch v. Board*, L. R. 5 H. L. 418, 461; *Railway Co. v. Brand*, L. R. 4 H. L. 171, 215, *et seq.* Some damages are allowed by our decisions which could not be suffered except by reason of the taking. The lot from which a part is taken is considered as one whole, as it is in England. *Maynard v. City of Northampton*, 157 Mass. 218 (81 N. E. Rep. 1062). A disadvantageous change in the shape or size of what remains, clearly, is a matter for compensation. And the principle which warrants such allowances was held, logically enough in *Walker v. Railroad Co.*, 103 Mass. 10, 15, to extend to considering depreciation of value arising from the proximity of a railroad and the running of trains, 'so far as it is due to proximity secured by means of taking a part of petitioner's land, and would not have resulted but for such taking,' although it is settled that similar depreciation would not be paid for if no land had been taken. *Presbrey v. Railway Co.*, 103 Mass. 1; *Fay v. Aqueduct Co.*, 111 Mass. 27; *Sawyer v. Davis*, 136 Mass. 239, 242 (49 Am. Rep. 27); *Taft v. Com.*, 158 Mass. 526, 547 (33 N. E. Rep. 1046); *Rand v. City of Boston*, *ubi supra*. This rule is narrower than that laid down in the Wisconsin and English cases, and if it is open to the objection that it is hard to apply, and too refined for practical purposes, at least it has the advantage of cutting down, and, in theory, of doing away with the anomaly which those cases recognize. To that extent the damage could not have been suffered but for the taking of the plaintiff's land, whereas, for similar works just outside the plaintiff's land, he could not have recovered, in the case supposed, either at common law or by the constitution. The rule laid down gives the damages, but only the damages due to the taking of plain-

tiff's land. It is true that the works might not have been constructed at all, if they had not been put where they were; but this consideration is met by the fact that if they had been constructed just outside his land the plaintiff would have suffered no wrong under the constitution, or at common law, if no statute had been passed, and would have had no remedy under the statute. At all events, the Massachusetts rule has been in force too long now to be questioned. It has been repeated in many cases and recently was acted on in the former decision of the case at bar. *Taft v. Com.*, 158 Mass. 526, 548 (33 N. E. Rep. 1046); *Drury v. Railroad Co.*, 127 Mass. 571, 583, 584; *Johnson v. Boston*, 130 Mass. 452, 454; *Pierce v. Drew*, 136 Mass. 75, 85 (49 Am. Rep. 7); *Cassidy v. Railroad Co.*, 141 Mass. 174, 178 (5 N. E. Rep. 142); *Wellington v. Railroad Co.*, 158 Mass. 185, 189 (38 N. E. Rep. 398); *Titus v. City of Boston*, 161 Mass. 209, 212 (36 N. E. Rep. 798)."

Sec. 245. Measure of damages—Appropriations for sewer purposes. The supreme court of Georgia say: "The construction of a sewer upon the land of another involves, to a certain extent, an appropriation of that land to the use of the public. It involves the appropriation of an easement in the premises, and the easement created by the act of appropriation may be of such a character as to amount to a practical appropriation of the fee. For the appropriation of his premises to this public use the owner is entitled to compensation in damages, and, under the city charter of Atlanta, if there be a corresponding advantage to his property lying adjacent, such advantage, if capable of being estimated in money, may be set off against the damages allowed for injuries to his property resulting from the building of the sewer. As to the property actually appropriated and covered by the sewer, the owner would be entitled to have its value allowed without any deduction because of any supposed advantage to that particular piece of property. See *Smith v. City of Atlanta*, 92 Ga. 119 (17 S. E. Rep. 985). In the assessment of damages, however, it is appropriate that the jury should take into consideration the nature of the easement, the character of the occupancy, the extent of the appropriation, to consider whether or

not, even though partially appropriated to the public use, it may not still be capable of being applied to the private advantage of the owner. All of these are considerations which should enter into and determine the jury in their assessment of damages." *City of Atlanta v. Hunnicutt*, 95 Ga. 188 (22 S. E. Rep. 180).

Sec. 246. Measure of damages—Non-contiguous lands. In Illinois it is held that in condemnation proceedings the assessment of damages must be confined to such damages as result from the taking of the property and the injury to that which is contiguous and cannot be extended to non-contiguous property though owned by the person from whom the property is taken and intended by him to be used in connection therewith, it not being so used at the time of the condemnation. *White v. Met. W. S. El. R. Co.*, 154 Ill. 620 (39 N. E. Rep. 270). The court say: "Section 18 of art. 2 of the constitution provides: 'Private property shall not be taken or damaged for public use without just compensation. Such compensation when not made by the state shall be ascertained by a jury as shall be prescribed by law.' It will be observed that no part of the ground north of Tilden street was taken by the railway company, but, as has been seen, the railway company took only a part of lot 6, which is separated from the block by a street. Whether appellants' block lying north of Tilden street has been or will be damaged by the construction and operation of the railway in and over a part of lot 6 is not the question presented by this record, but the question here involved, and the only one, is whether appellants are entitled to recover whatever damages they have sustained, if any, in this proceeding. In *Stetson v. Railroad Co.*, 75 Ill. 74, a bill was filed by a lot owner who owned lots fronting on the street to enjoin the construction and operation of a railroad in the street under an ordinance passed by the city of Chicago until the damages should be ascertained and paid. There no part of the lots had been taken, and the fee of the street upon which the railroad was constructed was in the city. It was held, first, that a court of equity had no jurisdiction; that the complainant's remedy was at law; and in discussing the right of one to recover damages to property not taken

under the eminent domain act it is said: 'A portion of the land having been taken, the remainder may be damaged in consequence of the taking. When the party seeking to make the condemnation has not embraced all of the owners of contiguous lands not actually taken but damaged the owner may file a petition in the nature of a cross petition. * * * It must be in this sense the word "damaged" is employed in the act to provide for the exercise of the right of eminent domain. The damages are direct and physical, and result from the taking of a portion of the land. But when no portion of the land is taken, and the damages suffered are consequential by reason of what the corporation does upon its own land or that of another, it does not seem there is any warrant for instituting proceedings for the ascertaining of such damages.' The rule declared in the Stetson Case was approved in *Railroad Co. v. Schertz*, 84 Ill. 185. In the discussion of the same question in *Insurance Co. v. Heiss*, 141 Ill. 55 (81 N. E. Rep. 188), it is said: 'It has been repeatedly held that a railroad company acquiring the right to lay its tracks in the streets of a city is not required to institute condemnation proceedings in respect to damages which may accrue to owners of property abutting such streets; and where no part of the land of an abutting lot owner is entered upon or sought to be condemned for public use the owner is not entitled to have proceedings instituted under the eminent domain law to ascertain what damage his property has suffered in consequence of the construction and operation of a railroad, * * * but the land owner is remitted to his action at law to recover his damages.' In *Parker v. Catholic Bishop*, 146 Ill. 160 (84 N. E. Rep. 478) it was held: Where no part of the land or property of the complainant owner is physically taken for or in making the proposed improvement, and the damages claimed to result are consequential only, the provision of the constitution relating to eminent domain does not require the ascertainment and payment of such damages as a condition precedent to the exercise of the right or power. The damages referred to in the constitution are direct and physical, resulting from a taking of a portion of the land; and, when no portion of the land is taken the damages suffered are consequential, and condemnation proceedings are not required to be instituted to ascer-

tain the same. It is sufficient to answer the constitutional requirement that a remedy is provided for the recovery of such damages by an action at law."

Sec. 247. Condemnation proceedings — Practice.

When land of the citizen is sought to be condemned for public use against his will and consent, a strict compliance with every essential prerequisite of the statute conferring the right is required. Even the corporate existence of a condemning municipal corporation may be called in question. *Orrick School Dist. v. Dorton*, 125 Mo. 439 (28 S. W. Rep. 765). The receiver of an insolvent railroad corporation has no power to institute condemnation proceedings in behalf of the railway company without authority so to do first given by the court in which the receivership proceedings were pending. *Minneapolis & St. L. Ry. Co. v. Minneapolis W. Ry. Co.*, 61 Minn. 502 (68 N. W. Rep. 1035). In the exercise of the right of eminent domain, the moving party may withdraw therefrom at any time before final judgment, but a resolution directing an attorney to ask leave of the court to withdraw is not conclusive until the court has acted upon the application. *Brady v. Atlantic City*, 53 N. J. Eq. 440. (32 Atl. Rep. 271). The right of a railroad company to enter upon condemned lands, conferred by a general railroad law upon payment of the amount found by the jury on the trial of an appeal from the report of commissioners, is not stayed by the suing out of a writ of error by the owner of the land. Nor is such right of entry stayed or lost by the subsequent setting aside of the verdict of the jury, for error in the rulings of the judge at the trial. *National Docks & N. Y. & C. Ry. Co. v. Penn. R. Co.*, N. J. Eq. (30 Atl. Rep. 1102). The right to have damages assessed given by a city charter, is held to be a cumulative remedy and the failure of the landowner to avail himself thereof is not a waiver of his rights. *City of Atlanta v. Hunnicutt*, 95 Ga. 138 (22 S. E. Rep. 130). Where the award or verdict specifies as a portion of the damage the value of the land actually taken, it will be presumed to mean the value of whatever interest is shown to have been involved. *Otero Canal Co. v. Fosdick*, 20 Colo. 522 (39 Pac. Rep. 332).

Sec. 248. Condemnation proceedings—Practice—Statutory construction. In determining whether statutes confer the right to exercise the power of eminent domain, the rules of strict construction are to be applied. But when the power has undoubtedly been conferred by a statute, then, in so far as it attempts to define the location or route, it is to receive a reasonable, rather than a strict, construction. It is against common right that a person or corporation should have the power, but, having the power, it is for the general good that they should not be hampered or embarrassed by a narrow and technical interpretation of it. *Tudor v. Chicago & S. S. Rapid Transit R. Co.*, 154 Ill. 129 (89 N. E. Rep. 186). Under Mich. How. Ann. Stat., §§ 8466 and 8468, it is held that a circuit judge may be present and preside over a proceeding by a jury to condemn land for depot purposes; that where an award of damages is paid and on a second trial the award is for a smaller amount, the difference must be refunded and judgment may properly be entered therefor; and that on an appeal costs should be awarded to the successful party. *Fort St. Union Depot Co. v. Backus*, 108 Mich. 556 (61 N. W. Rep. 787). The Iowa Code, § 925, provides that a highway "must not be established * * * through any garden, orchard or ornamental ground contiguous to any dwelling house * * * without the consent of the owner." Under this statute it is held that a small plum tree, a cottonwood tree, a small grape vine, a wild current bush and a few small rose bushes did not constitute an orchard or ornamental ground, and that evidence that the land owner planted the trees for the purpose of preventing the establishment of a highway upon the ground will support a finding that the improvements were not made in good faith. *Ballou v. Elder*, Ia. (64 N. W. Rep. 622). Under Kansas Code, §§ 40, 425-435, it is held that where a railroad corporation pending an appeal against it in a right of way condemnation, consolidates with other companies, no proceeding for revivor or substitution against the new corporation can be commenced after one year from the consolidation, except by its consent. *Chicago, K. & W. R. Co. v. Butts*, 55 Kan. 660 (41 Pac. Rep. 948). The Missouri Stat., Laws 1887, p. 87, provides that "the petition may be presented to the circuit court when in session, or

to any judge thereof in vacation. Upon filing the petition a summons shall be issued, giving the defendants at least ten days' notice of the time when said petitions shall be heard, which summons shall be served in the same manner as writs of summons are or may be by law required to be served." Construing and applying this statute it is held that the clerk of the court has no authority to issue the summons or order publication except upon order of the court or judge in vacation, and that a proceeding based upon notice issued by the clerk is without jurisdiction. *Williams v. Monroe*, 125 Mo. 574 (28 S. W. Rep. 853). New York Laws, 1887, ch. 728, does not affect the power of the supreme court under the general railroad law to appoint commissioners to ascertain compensation due to land owners on account of an appropriation for a street railway. *In re Southern B. R. Co.*, 146 N. Y. 352 (40 N. E. Rep. 1000). Under the Pennsylvania constitutional provision requiring municipal corporations to make compensation for property injured or destroyed by construction or enlargement of their works, highways or improvements, it is held that a city is liable for injuries to a house from the excavation of a sewer in front thereof. *Ladd v. Philadelphia*, 171 Pa. St. 485 (38 Atl. Rep. 62). It is held that the Pennsylvania Statutes, Act March 21, 1836, and Act May 25, 1887, authorizing the condemnation of property for the purposes of water works are concurrent and that parties may avail themselves of the provisions of either statute. *Shroder v. City of Lancaster*, 170 Pa. St. 136 (32 Atl. Rep. 587). The Pennsylvania Statute, Act May 29, 1885 (Pub. Laws, p. 29), which provides among other things that a natural gas company will not be permitted to lay its pipes or conduits on the street or highway of any borough or city without its assent, applies as well to gas companies in existence at the time of its enactment as well as those that may thereafter be organized. *Philadelphia Co. v. Freeport*, 167 Pa. St. 279 (31 Atl. Rep. 571). R. I. Pub. Stat., ch. 64, § 35, concerning commissioner's report of condemnation proceedings against land and notice thereof, construed and applied. *Whalen v. Bates*, R. I. (33 Atl. Rep. 224). The Michigan Constitution, Art. 18, § 2, provides that, when private property is taken for public use, the neces-

sity for using such property, and the just compensation therefor, except when to be made by the state, shall be ascertained by a jury of twelve freeholders, or by not less than three commissioners appointed by a court of record, as shall be prescribed by law. How. Ann. St., § 2, par. 8, provides that all words purporting to give a joint authority to three or more public officers or other persons shall be construed as giving such authority to a majority, unless otherwise expressly declared in the law giving the authority. Under this constitution and statute it is held that a majority of the commissioners may determine the necessity for taking property. *Serrell v. Oakland Probate Judge*, Mich. (65 N. W. Rep. 107).

EQUITY.

EPITOME OF CASES.

Sec. 249. Concerning the doctrine of equitable conversion. Where the testator orders his land to be sold unless the contrary intention distinctly appears, the conversion will be deemed to have been directed merely for the purpose of the will, and if these fail the land in equity will be considered real estate and given to the heir. *Moore v. Robbins*, 53 N. J. Eq. 187 (32 Atl. Rep. 879). Where a will contains a general power of sale for the purpose of paying debts and the executors have sale thereunder a conversion has taken place and the proceeds may be applied to the payment of the testator's debts and to the reimbursement of the executors for debts of the testator which they may have paid from personal funds. *Bolton v. Myers*, 146 N. Y. 257 (40 N. E. Rep. 737). Where a will directs the sale of land and a distribution of the proceeds, the persons who are exclusively entitled to the fund arising from the sale may, by their unanimous election prior to the actual sale, take the real estate in its unconverted form. *McDonald v. O'Hara*, 144 N. Y. 566 (39 N. E. Rep. 642). "The rule of equitable conversion merely amounts to this: that where

there is a mandate to sell at a future time, equity, upon the principle of regarding that done which ought to be done, will for certain purposes, and in aid of justice, consider the conversion as effected at the time when the sale ought to take place, whether the land be then really sold or not. But whenever the direction is for a future sale, up to the time fixed the land is governed by the law of real estate." *In re Walkerly's Estate*, 108 Cal. 627 (41 Pac. Rep. 772) Citing, *Savage v. Burnham*, 17 N. Y. 561; *Vincent v. Newhouse*, 88 N. Y. 505; *Underwood v. Curtis*, 127 N. Y. 533 (28 N. E. Rep. 585); *De Wolf v. Lawson*, 61 Wis. 469 (21 N. W. Rep. 615; 50 Am. Rep. 148). Where a testator clothes his executor with power to sell, convey and purchase other real estate and sell and convey it, the exercise of the power by the trustee works a conversion from realty to personalty and from personalty to realty as the case may be, and the status of the property at any time is to be determined by its actual condition, *In re Ingersoll's Estate (App. of Maury)*, 167 Pa. St. 549 (31 Atl. Rep. 859); but where the ground rent is paid off to the trustees not by their choice but by that of the ground tenant acting in his legal right, there is no conversion to personalty though the trustee had a discretion to sell, there having been no exercise of discretion on their part, *In re Ingersoll's Estate (App. of Lindenberger)*, 167 Pa. St. 550 (31 Atl. Rep. 860). Where the contract for the sale of land provided that on the vendee's failure to pay the price at the stipulated time, all his interest should cease, and his death occurred before the time for payment, his interest in the property should be treated as personalty, there having been no default on the part of the vendee and the executor of the vendor has power to extend the time of payment. *William v. Haddock*, 145 N. Y. 144 (39 N. E. Rep. 825). The court say: "The general rule in regard to contracts for the sale of land is that the owner of the real estate from the time of the execution of a valid contract for such sale is to be treated as the owner of the purchase-money, and the purchaser of the land is treated as the equitable owner thereof. The vendor is deemed in equity to stand seised in the land for the benefit of the purchaser, and the latter, even before the conveyance to him, can devise the same,

and it descends to his heirs, and the land which was agreed to be sold has been turned into money belonging to the vendor. Courts of equity regard that as done which ought to be done. They look at the substance of things, and not at the mere form of agreements, to which they give the precise effect which the parties intended. It is presumed that the vendor, in agreeing so sell his land, intends that his property shall assume the character of the property into which it is to be converted, and it cannot be denied that it is competent for the owner of the land thus to make such land into money at his sole will and pleasure. If the vendor die prior to the completion of the bargain, provided there has been no default, the heir of the vendor may be compelled to convey, and the proceeds of the land will go to the executors as personal property. Story, Eq. Jur. §§ 790, 791, 1212; Sugd. Vend. (8th Am. Ed.), pp. 270, 278, c. 5; *Baden v. Pembroke*, 2 Vern. 218; *Fletcher v. Ashburner*, 1 Brown, Ch. 497; *Eaton v. Sanxter*, 6 Sim. 517; *Farrer v. Earl of Winterton*, 5 Beav. 1; *Livingston v. Newkirk*, 8 Johns., Ch. 812; *Champion v. Brown*, 6 Johns., Ch. 898 (10 Am. Dec. 848); *Craig v. Leslie*, 8 Wheat. 568 (4 L. Ed. 460)."

Sec. 250. Subrogation. One who furnished the money with which to discharge a prior mortgage is entitled to be subrogated thereto for the purpose of establishing the priority of his lien. *Draper v. Ashley*, 105 Mich. 527 (62 N. W. Rep. 707); *Nixon v. Julian*, 72 Miss. 570 (18 So. Rep. 866). Subrogation is not given to one who officiously as a stranger pays the debt of another, nor to one who is guilty of any fraud in the transaction on which he asks the subrogation. *Bates v. Swiger*, 40 W. Va. 420 (21 S. E. Rep. 874). Nor to one who pays a debt which he has assumed to pay. *Steinreide v. Tegge*, Ky. (29 S. W. Rep. 626). One who advances money at the instance of a debtor to be used by the latter in payment of a prior security is not a stranger or intermeddler in his affairs within the rule which denies to such persons a remedy by way of subrogation. The relief by subrogation to earlier liens which have been paid off with money advanced by a subsequent mortgagee under agreement that he shall have a first lien is not destroyed by the fact that the ear-

lier liens have been actually paid off and canceled in pursuance of the agreement that this should be done, since equity will consider them alive so long as justice requires. The holder of an intermediate mortgage, who is not placed in any worse attitude by the subrogation of a subsequent mortgagee to the first lien on the property, which was paid off with money advanced by the last mortgagee on a promise that he should have the first lien, cannot defeat such subrogation, even if he has not waived or become estopped to assert his priority. *Union Mort. B. & T. Co. v. Peters*, 72 Miss. 1058 (18 So. Rep. 497; 80 L. R. A. 829). A surety may be subrogated to the rights of a *cestui que trust* in lands held in trust for the payment of debts, such surety having been required to pay the debt. *Holden v. Strickland*, 116 N. C. 185 (21 S. E. Rep. 684). Where a grantee in a deed, believing that he is the owner of the land, in good faith pays a mortgage thereon, he will be subrogated to the rights of the mortgagee when the deed is set aside on the ground that there was no delivery. *Stewart v. Stewart*, 90 Wis. 516 (68 N. W. Rep. 886; 48 Am. St. Rep. 949). One who furnishes a mortgagor, whose property is subject to two mortgages, money with which to pay off a first mortgage on his premises and takes a new mortgage to secure its payment, voluntarily relying upon the abstract which erroneously shows that a second mortgage on such premises has been satisfied, cannot claim the right to revive the lien of such first mortgage and be subrogated thereto in order to secure priority over such second mortgage. *Rice v. Winters*, 45 Neb. 517 (98 N. W. Rep. 830). See opinion for exhaustive discussion of this subject. It is held that where a husband has conveyed land subject to incumbrances, his wife not joining in the conveyance, and the grantee assumes the incumbrances and without knowledge of the wife's inchoate interest believing the husband to be unmarried, pays and satisfies such incumbrances, as against the wife's claim, such grantee will be subrogated to the rights of the holders of the incumbrances. *Fowler v. Maus*, 141 Ind. 47 (40 N. E. Rep. 56). One who purchases at an invalid tax sale will be subrogated to the lien of the state for taxes. *Weston v. Meyers*, 45 Neb. 95 (68 N. W. Rep. 117). A purchaser at an invalid administrator's sale to pay debts cannot be

subrogated to the rights of creditors whose claims his money has paid. *Borders v. Hodges*, 154 Ill. 498 (89 N. E. Rep. 597).

Sec. 251. Miscellaneous notes. The doctrine of marshaling assets applies where one of the creditors in a general deed of assignment for the whole amount of his debt has a prior security on a piece of property which is also conveyed by such deed. *Winston v. Biggs*, 117 N. C. 206 (28 S. E. Rep. 816). An equitable title is not affected by a conveyance of the legal title without consideration. *Bradford v. King*, 18 R. I. 748 (81 Atl. Rep. 166). An equitable title, with the party holding the equity in possession at the time the legal title is acquired, has preference over the legal title. *Howard v. Howard*, 96 Ky. 445 (29 S. W. Rep. 285). Where an aged parent has devised land to a child which he has placed in possession saying that he desires it to hold the property during his own life and afterwards became insane, equity will not permit the legal guardian to dispossess the child, but will give affect to the purpose of the parent expressed during his sanity. *Potter v. Berry*, 58 N. J. Eq. 151 (82 Atl. Rep. 259; 51 Am. St. Rep. 626). As to practice in equity cases see Real actions.

ESTATES.

EPITOME OF CASES.

Sec 252. Fee simple estates. In Delaware the use of the word "heir" is necessary to the creation of an estate in fee. *Prettyman v. Conaway*, 9 Houst. (Del.) 221 (82 Atl. Rep. 15). A conveyance of land by a father to his daughter "and her body heirs (if any), and, in the event she has no children, then the land hereinafter described is to revert back to my estate," vests in her a defeasable fee, which becomes absolute upon her bearing children. *McGennis v. McGennis*, Ky. (29 S. W. Rep. 888). A deed by one to whom J. D. has conveyed the land in trust for himself and family

executed "to S. A. D. and her heirs by J. D., their heirs and assigns, forever," after the death of J. D. was held not to create a fee tail in S. A. D., convertible into a life estate by Mo. Rev. Stat. 1889, § 8886, but a fee simple in said S. A. D., and said children. *Fanning v. Doan*, 128 Mo. 323 (30 S. W. Rep. 1032). A conveyance to certain minor children, their heirs and assigns, "to be held in common and unsold" until the youngest shall become of age, passes a fee simple to the grantees, and the restriction against alienation is of no effect. *Bouldin v. Miller*, 87 Tex. 359 (28 S. W. Rep. 940). Particular conveyance to a trustee, under an order of court, held to vest in him an estate in fee. *Brown v. McCall*, 44 S. C. 503 (22 S. E. Rep. 823). Although a devise is made expressly for life, if the devisee is given absolute power of alienation he takes a fee simple estate. *Farish v. Wayman*, 91 Va. 430 (21 S. E. Rep. 810). Under N. Y. Rev. Stat. Vol. 1, p. 733, § 84, a devise to one for life, without any power to convey but with full power to devise, with remainder to his heirs in case he dies intestate, vests in him a fee. *Deegan v. Wade*, 144 N. Y. 573 (39 N. E. Rep. 692). A devise of land "to W. * * * and his children forever, but if W. shall die leaving no child" the farm was devised to J. was held to give W. the fee simple, to be defeated only in case he die without children. *Hood v. Dawson*, Ky. (33 S. W. Rep. 75). A devise in trust to A. for life, which provides that "should the said A. die and leave no child, in that case the property devised as above, or what may remain of the same, I give to N.," vests in A. the absolute estate. *Farish v. Wayman*, 91 Va. 430 (21 S. E. Rep. 810). A devise of real property to the wife of the testator "for her sole use and comfort during her natural life and to her heirs and assigns forever," is held to create a fee and not a life estate. *Kendall v. Clapp*, 163 Mass. 69 (39 N. E. Rep. 773). A devise of land to the testator's daughter which provided that in case of her "dying unmarried, or, if married, dying without offspring by her husband," then the property to be sold and the proceeds divided among others, gives her an absolute estate, where she survives the testator. *Mitchell v. Pittsburg Ft. W. & C. Ry. Co.*, 165 Pa. 645 (31 Atl. Rep. 67). A devise by a testator to his wife of all his estate "in fee simple, to own, use,

enjoy, and dispose of the same as she may deem proper and right, the same as I might or could do if living," is not reduced below a fee by another provision as to the disposition of whatever of the estate the widow may not sell or dispose of during her life. *Evans v. Smith*, 166 Pa. 625 (31 Atl. Rep. 846). A devise as follows: "I will and bequeath all of my real and personal property to my beloved wife, Mary, to have and to hold the same for her own proper use and behoof as long as she shall remain my widow, and, if she should get married, then she shall be only entitled to the one-third in said property, the balance, being two-thirds, to my youngest daughter, Kate, and, if the said Kate should die, then I will and bequeath the two-thirds to my son, William, and, if both should die, then the residue remaining shall be equally divided among my remaining children," was held to give the widow the whole estate in fee, subject to the condition that she should not marry again, and defeasible as to two-thirds upon the breach of that condition. *Redding v. Rice*, 171 Pa. 801 (33 Atl. Rep. 880).

Sec. 253. Estates tail. By the statute of Kentucky estates tail are converted into an estates in fee. *McGennis v. McGennis*, Ky. (29 S. W. Rep. 338). Mo. Rev. Stat. 1889, § 8836, applied—conversion of fee tail into life estate. *Fanning v. Doan*, 128 Mo. 828 (30 S. W. Rep. 1032). A devise of land with limitation over if the devisee should die "without leaving issue" creates a fee tail, which, by the statutes of New Jersey is converted into a life estate. *Patterson v. Madden*, N. J. Eq. (33 Atl. Rep. 51). In Rhode Island a devise of land by a testator to his daughter "and to her heirs and assigns, forever, providing that she dies leaving lineal heirs of her body," but in case she dies "leaving no child or children or descendants to take and hold said real estate," the same should go to others, was held to give the daughter an estate tail. *Holden v. Wells*, 18 R. I. 802 (31 Atl. Rep. 265).

Sec. 254. Shelley's case. The rule has no application to personal property. *Gross v. Sheeler*, 7 Houst. (Del.) 280 (31 Atl. Rep. 812). It cannot be invoked to defeat the intention of the testator. *Zavitz v. Preston*, Ia. (64 N.

W. Rep. 668). In Delaware, it is held by a divided court that the rule has no application where the word "child" or "children" are used and not "heirs" or "heirs of the body." *Jamison v. McWhorter*, 7 Houst. (Del.) 242 (31 Atl. Rep. 517). Under the rule a conveyance to grantees "during their natural lives and at their death to the heirs of their body," gives the grantees a fee simple, *Waters v. Lyon*, 141 Ind. 170 (40 N. E. Rep. 662); and a devise to one for his life and after his death "unto his then surviving heirs in fee," vest a fee in the first devisee. *Heister v. Yerger*, 166 Pa. 445 (31 Atl. Rep. 122). A deed to one "during the term of his natural life, and his heirs forever," comes within the rule and vests a fee in the grantee. *Tucker v. Williams*, 117 N. C. 119 (23 S. E. Rep. 90). The rule was held to apply to a devise to the testator's two daughters, "to be equally divided, share and share alike, and to their lawful heirs; but, in the event of their death without issue, then in such an event, if the executors can dispose of the property to advantage, to sell immediately, or within two years from the date of their decease; but in case of the death of either [daughter] the surviving one to inherit the portion of the deceased sister, if she dies without issue." *Silva v. Hopkinson*, 158 Ill. 886 (41 N. E. Rep. 1013). Under the rule a devise to one and his heirs vests in him a fee, although a subsequent clause of the will declares that the land shall go to certain named persons on the death of the devisee without heirs of his body. *Ewing v. Barnes*, 156 Ill. 61 (40 N. E. Rep. 325). The rule was held not to apply to a trust deed giving the income of land for the maintenance of the grantor's wife and children during her life, the land to be conveyed by the trustees to the children and heirs of the wife on her death, the word "children," a word of purchase, being the controlling word. Each of the children living when the deed was made take a vested remainder in fee. *Cowell v. Hicks*, N. J. Eq. (30 Atl. Rep. 1091). For a case with annotations on this subject, see 3 Ballards' Annual, §§ 290-294.

Sec. 255. Life estates. A devise to one "during his natural life," and "at his death the premises to go to, and be equally divided between, his heirs and next of kin," was held to create a life estate, the rule in Shelley's case not applying.

Zavitz v. Preston, Ia. (64 N. W. Rep. 668). Where the owner of an estate tail failed in an attempt to create a fee simple in his grantee through an omission of legal words of limitation, the grantee takes an estate for the grantor's life, that being the most valuable estate the deed of conveyance used could create. *Prettyman v. Conaway*, 9 Houst. 221 (82 Atl. Rep. 15). Where a father conveyed land to his children to have and to hold "after the support of [the grantor and his wife] their life-time," there being nothing in the deed charging upon the grantees any duty of furnishing the parents a support, or any specifications of what the support was to consist, it was held that the grantor reserved a life estate for himself and wife, the fee to vest in the grantees after the death of both parents. *Rollins v. Davis*, 96 Ga. 107 (28 S. E. Rep. 892). One to whom land is devised "to hold as long as she may remain a wife," is a life tenant within the meaning of the North Carolina statute, Acts 1887, ch. 214, § 8. A remainder after such estate is a vested remainder. *Gillespie v. Allison*, 115 N. C. 542 (20 S. E. Rep. 627). A devise of land to a wife "during her life, with full power to sell, transfer, and dispose of the same as much as may from time to time be needed for her support and the cancellation of any indebtedness now and hereafter existing," the remainder at her death to go to a son, gives her a life estate with power to dispose for the purposes specified, and remainder to the son. *In re Proctor's Estate*, Ia. (68 N. W. Rep. 670). A devise to one for life with remainder to his child or children or the issue of such, if he should die leaving any such, and in case of his death without leaving any such, the estate to go to his brothers, vests in such person an estate for life. Houston, J., dissenting. *Famison v. McWhorter*, 7 Houst. (Del.) 242 (81 Atl. Rep. 517). Particular agreement held to create a life estate. *Napier v. Anderson*, 95 Ga. 618 (28 S. E. Rep. 191). An unexecuted general power of appointment by will, conferred upon a life tenant, will not enlarge the life estate into an absolute estate. *Sires v. Sires*, 48 S. C. 266 (21 S. E. Rep. 115). For construction of particular devise as to liability of life tenant for repairs and taxes, see *Clarke v. Clarke*, 145 N. Y. 476 (40 N. E. Rep. 220). The life tenant is bound to pay the current taxes on the land. *Disher v.*

Disher, 45 Neb. 100 (63 N. W. Rep. 868). As to improvements by life tenant, see, Improvements.

Sec. 256. Sale of life estate—Forfeiture. A life tenant who permits the premises to be sold to pay an assessment for municipal improvements and subsequently purchases the title of the purchaser at such sale, such title inures to the remainderman. *Nineteenth & Jefferson St. Presbyterian Church v. Fithian*, Ky. (29 S. W. Rep. 143). A statute, Pa. Act, Oct. 13, 1840, § 6, which provides that where a life estate is sold upon execution, “the court shall, upon the application of a lien creditor, award a writ to sequester the rents, issues and profits of such estate and appoint a sequestrator to carry the same into effect,” is held not to apply where a life tenant makes an assignment for creditors of the life estate after judgment against him but before the execution sale. *In re Lewis’ Estate*, 170 Pa. 376 (32 Atl. Rep. 1046). If a tenant for life and the remainderman or reversioner of the fee unite in a sale and conveyance of the estate, without any agreement providing for an apportionment of the purchase money between them, a court of equity will intervene, and apportion according to their respective interests in the land at the time of the sale. In such a suit such a purchaser who has given a purchase money mortgage is a necessary party. *Thompson v. Thompson*, 107 Ala. 163 (18 So. Rep. 247).

Under Ala. Code, § 1842, providing that “a conveyance made by a tenant for life or years, purporting to convey a greater interest than he possesses or can lawfully convey, does not work a forfeiture of his estate, but passes to the grantee all the estate which the tenant could lawfully convey,” it is held that a conveyance by the life tenant either of the nominal fee for life, or the suffering of a disseisin by him does not forfeit the particular estate to the remainderman. *McMichael v. Craig*, 105 Ala. 382 (16 So. Rep. 883). No forfeiture of the estate of a life tenant accrues, under § 2852, Ohio Rev. St., from the failure of the tenant to pay the taxes on the land, in consequence of which the land is sold at delinquent tax sale, where, by reason of errors or irregularities in levying the tax or in making the sale, no valid deed can be made by the auditor to the purchaser at the tax sale. *Williams and Bradbury*,

JJ., dissenting. *Estabrook v. Royon*, 52 O. St. 818 (89 N. E. Rep. 808; 82 L. R. A. 805). "The purchaser of an estate in remainder at a sale on foreclosure of a mortgage upon the estate, made subject to the life estate on which the remainder is limited, cannot claim a forfeiture of the life estate from a sale of the lands at delinquent tax sale and a failure to redeem within the time prescribed by § 2852, Rev. St., where the omission occurred prior to the foreclosure, and there is nothing to show but that the forfeiture was waived by the mortgagor. Williams and Bradbury, JJ., dissenting." *Chaffee v. Foster*, 52 O. St. 858 (89 N. E. Rep. 947).

Sec. 257. Remainders. During the life of a life tenant the remainderman cannot maintain ejectment. *McMichael v. Craig*, 105 Ala. 882 (16 So. Rep. 888). The statute of limitations cannot run against a remainder man until the termination of the preceding estate. *Napier v. Anderson*, 95 Ga. 618 (28 S. E. Rep. 191); *Rollins v. Davis*, 96 Ga. 107 (28 S. E. Rep. 892); *Ogden v. Ogden*, 60 Ark. 70 (28 S. W. Rep. 796; 46 Am. St. Rep. 151). Nor can he be guilty of laches until that time. *Borders v. Hodges*, 154 Ill. 498 (89 N. E. Rep. 597). Where a remainder is devised to children who survive the life tenant, they may make an agreement to disregard the survivorship clause and have the estate vest in them as at the time of the testator's death. *In re Ralston's Estate*, 172 Pa. 104 (88 Atl. Rep. 273).

Sec. 258. Vested and contingent remainders. A vested remainder may be conveyed. *Brown v. McCall*, 44 S. C. 508 (22 S. E. Rep. 828); *Tindall v. Miller*, 148 Ind. 387 (41 N. E. Rep. 535); *Cowell v. Hicks*, N. J. Eq. (80 Atl. Rep. 1091). A contingent remainderman may convey his expectancy and such conveyance will be treated as an executory contract to be enforced in equity. *Wright v. Brown*, 116 N. C. 26 (22 S. E. Rep. 318). Where a devise was made to a widow during life or widowhood, with remainder to an only son, the son takes a vested estate which may be inherited from him. *McKensey v. McKensey's Ex'r.*, Ky. (28 S. W. Rep. 782). A devise to the testator's wife "so long as she may live" and upon her death to pass "absolute to my daughter, J., if she still survive. If she shall be

deceased, it is my desire that the property do pass to her heirs," vests a remainder in the daughter at the death of the testator, which she may dispose of. *Tindall v. Miller*, 148 Ind. 337 (41 N. E. Rep. 535). A devise to a woman and her heirs, and in case of her death without issue, to another and her heirs, creates a contingent remainder in the latter devisee. *Wright v. Brown*, 116 N. C. 26 (22 S. E. Rep. 813). A conveyance to trustees with directions to collect the rents and pay the same to the grantor's wife during her life, and at her death to sell the land "and divide the proceeds equally among the children," gives the children no interest in the land and their interest in the proceeds is contingent on their surviving their mother. *Strode v. McCormick*, 158 Ill. 142 (41 N. E. Rep. 1091).

Sec. 259. Vesting of estates. Where a testator devises land to trustees, the income therefrom to be paid to his daughter during her life, and after her death in trust for all of her children equally and absolutely, it is held that her death terminates the trust and the estate vests absolutely in the children and their minority does not change the rule. *Felgner v. Hooper*, 80 Md. 262 (30 Atl. Rep. 911). Where a testator devises land to his son in trust for his daughter for her to occupy and enjoy "for her separate use, not to be under the control or subject to the debts of her husband, but to enjoy all rents, issues and profits during her natural life, and at her death to descend to the issues of her body: but if she should die, leaving no issue, then the said estate to revert back to, and be a part of, my residuary estate," it is held that the children of such daughter have no vested interest in such land until after her death. *Wilson v. Denig*, 166 Pa. St. 29 (30 Atl. Rep. 1025).

Sec. 260. Estates in joint tenancy—Mortgage by joint tenant. One joint tenant may convey or mortgage his interest, but he has no estate which will pass by devise. Under Ind. Rev. Stat. 1894, § 1200, he may enforce partition. *Wilken v. Young*, Ind. (41 N. E. Rep. 68). The court say. "Upon the death of one joint tenant, there being no severance in the estate, his entire interest is cast upon the survivor or survivors, to the exclusion of the inheritance of the

same by his heirs. The interest of the survivor in the realty is consequently increased by the extinguishment of the interest of the tenant deceased. It is settled in law that a joint tenant may alienate or convey to a stranger his part or interest in the realty, and thereby defeat the right of the survivor. Tied. Real Prop. § 288; 1 Wash. Real Prop. 682, cl. 22; 4 Kent Comm. 460; 1 Prest. Est. 186; *Bevins v. Cline*, 21 Ind. 40; 6 Am. & Eng. Enc. Law, 892; 11 Am. & Eng. Enc. Law, 1092; *Duncan v. Forrer*, 6 Bin. 198. In the ancient language of the law, joint tenants were said to hold *per my et per tout*, or, in plain words, 'by the moiety or half and by all;' the true interpretation of this phrase being that these tenants were seised of the entire realty for the purpose of tenure and survivorship, while for the purpose of immediate alienation each had only a particular part or interest. Prest. Est. *supra*; 4 Kent Comm. *supra*. Partition at common law could not be enforced by joint tenants, but under our statute partition of these estates may be enforced. Rev. Stat. 1881, § 1186 (Rev. Stat. 1894, § 1200). The interest of each tenant is subject to sale upon execution. *Thornburg v. Wiggins*, 185 Ind. 178 (84 N. E. Rep. 999; 41 Am. St. Rep. 422; 22 L. R. A. 42); Freeman, Ex'ns, § 125. Having these rights and powers at least over his interest in the land so held, there can be no sufficient reason urged why the power of the joint tenant to mortgage the same should be denied. Any interest in real estate which a person may sell and convey he may also mortgage. Jones, Mortg., § 136. We are therefore of the opinion that a joint tenant may mortgage his interest in the joint estate in like manner as though he were a tenant in common, and to the extent of the mortgage lien the right of the survivor will be destroyed or suspended, and the equity of redemption at the death of the tenant, will be all that will fall to the surviving companion. This right of the tenant to mortgage is supported by the following authorities: *York v. Stone*, 1 Salk. 158; *Simpson's lessee v. Ammons*, 1 Bin. 175."

Sec. 261. Perpetuities. Declaring a final disposition of a trust fund void on account of the statute of perpetuities does not necessarily defeat the entire trust. *Morris v. Bolles*, 85 Conn. 45 (81 Atl. Rep. 588). The absolute ownership

and power of alienation are not suspended so as to create a perpetuity merely because the executor may require a period of time not measured by lives, in which to execute the power of sale to convert the land into money. *Deegan v. Wade*, 144 N. Y. 573 (39 N. E. Rep. 692). A devise to a board of trustees with directions to erect a building on the real estate to be "forever" known by the testator's name, which is to be held together with the remainder of his estate and to be known as testator's "trust estate," the income to be divided amongst his lawful heirs, a provision being made for the filling of vacancies in the board "forever thereafter" by a certain court, creates a perpetuity and is void. *Williams v. Herrick*,

R. I. (32 Atl. Rep. 913). Where a testator devises all his property in trust to continue until the death of the last of his five children, at which time the estate was to be divided equally among his "grandchildren and their heirs," the provision as to the final distribution of the estate violates the statute of perpetuities. *Morris v. Bolles*, 65 Conn. 45 (31 Atl. Rep. 538). Where a testator devised all of his property to his executors in trust, with directions to apply the income therefrom, first, to his wife, the whole or so much of the income as she shall require, the residue to be paid in equal shares to his children, and in case of the death of any child, his share to be paid to his "heirs and legal representatives," who are to take "by way of representation," and upon the death of the last survivor of his wife and children the balance of the estate should be conveyed in equal shares to the "heirs and legal representatives" of the children, who were to take "by way of representation," it is held that the last provision is void, being in violation of the statute against perpetuities. *Ketchum v. Corse*, 65 Conn. 85 (31 Atl. Rep. 486).

Under Cal. Civ. Code, § 715, providing that "the absolute power of alienation cannot be suspended, by any limitation or condition whatever, for a longer period than during the continuance of the lives of persons in being at the creation of the limitation or condition," it is held that a devise of an estate to a trustee to hold and manage for a fixed period, and then sell and distribute among certain persons, is void. *In re Walkerly's Estate*, 108 Cal. 627 (41 Pac. Rep. 772; 49 Am. St.

Rep. 97). This section of the Code applies to personal property as well as real estate. *In re Walkerly's Estate*, 108 Cal. 627 (41 Pac. Rep. 772; 49 Am. St. Rep. 97). Section 771 of the same Code provides that "The suspension of all power to alienate the subject of a trust, other than a power to exchange it for other property to be held upon the same trust, or to sell it and re-invest the proceeds to be held upon the same trust, is a suspension of the power of alienation, within the meaning of section 715," and under it is held that, although a devise allows a trustee to sell the property at any time, if the will directs him to hold the proceeds for a definite time before distribution, a perpetuity is created. *In re Walkerly's Estate*, 108 Cal. 627 (41 Pac. Rep. 772; 49 Am. St. Rep. 97).

Sec. 262. Conditions subsequent. Conditions subsequent are not favored and are to be strictly construed. *Mutual Ben. L. Ins. Co. v. Rector etc. Grace Church*, 58 N. J. Eq. 418 (32 Atl. Rep. 691); *Ritchie v. Kansas N. & D. Ry. Co.*, 55 Kan. 86 (39 Pac. Rep. 718). Until the condition has been broken, the grantor has no right to re-enter as for a forfeiture, and no cause of action to cancel the deed. *Denham v. Walker*, 98 Ga. 497 (21 S. E. Rep. 102). Where a deed conveys an easement only and not a fee, the right to maintain an action of forfeiture for a breach of a condition subsequent is not limited to the grantor or to his heirs but extends to those claiming under them. *Reichenbach v. Washington S. L. Ry. Co.*, 10 Wash. St. 857 (38 Pac. Rep. 1126). A deed which binds the grantee, as the consideration therefor, to pay an annuity to the grantors during their life, and which does not contain a provision for re-entry in case of non-performance of this agreement, does not create an estate upon a condition subsequent, but the agreement may be enforced as a lien upon the land. *Doescher v. Doescher*, 61 Minn. 326 (63 N. W. Rep. 736). Where land was conveyed to a religious corporation, upon the express condition that the grantee should not mortgage or sell the land, nor permit the erection of any building thereon except a church to be used for worship of a prescribed religious character; but such deed provided for the giving of a certain mortgage of even date, which should not be affected by the conditions in the deed but should have the

same validity as if it had been made prior to such conveyance, it is held that a charitable use was not created but an estate upon condition; that the foreclosure of the mortgage provided for does not amount to a breach of the condition, and the corporation or its creditors will be entitled to the surplus upon such a foreclosure sale. *Mutual Ben. L. Ins. Co. v. Rector etc. Grace Church*, 53 N. J. Eq. 418 (32 Atl. Rep. 691). Particular conveyance of the right of way to a railroad, conditioned upon its constructing and maintaining a ditch, held to create a condition subsequent. *Mills v. Seattle & M. Ry. Co.*, 10 Wash. St. 520 (39 Pac. Rep. 246).

Sec. 263. Conditions subsequent—Conveyance of land for particular use. An absolute conveyance of land to a city “as and for a street to be kept as a public highway,” does not create a condition subsequent so as to work a forfeiture in case the property is not maintained as a public street. *Kilpatrick v. Mayor etc. of Baltimore*, 81 Md. 179 (31 Atl. Rep. 805). The court say: “Technical words are not absolutely essential to create a condition, nor, on the other hand, does their use necessarily raise one. Such words may be controlled by the context of the instrument in which they are used, so that sometimes they work a limitation and condition, and sometimes a covenant or trust only. *Paschall v. Passmore*, 15 Pa. St. 295; *Bacon v. Huntington*, 14 Conn. 92; *Worman’s Lessee v. Teagarden*, 2 Ohio St. 380; *Watters v. Bredin*, 70 Pa. St. 235; *Laberee v. Carleton*, 33 Me. 211. Conditions subsequent are not favored in law, ‘because on breach of such conditions there is a forfeiture, and the law is adverse to forfeitures.’ 4 Kent Comm. 180; *Stanley v. Colt*, 5 Wall. 119. Therefore it is that a condition will not be raised by implication from a mere declaration in the deed that the grant is made for a special and particular purpose, without being coupled with words appropriate to make such a condition. *Packard v. Amos*, 16 Gray, 327; *Bigelow v. Barr*, 4 Ohio 359. And as a further consequence of this rule it has always been held that ‘in doubtful cases the disposition of the courts is to construe language as creating a trust or covenant, rather than a condition.’ See Mr. Brantley’s note to the case of *Earle v. Dawes*, 3 Md., Ch. 230, and authorities there cited;

Scovill v. McMahon, 62 Conn. 378 (26 Atl. Rep. 481; 86 Am. St. Rep. 850; 21 L. R. A. 58); *Greene v. O' Connor*, 18 R. I., 46 (25 Atl. Rep. 692; 19 L. R. A. 262); *Rawson v. Inhabitants of School Dist. No. 5*, 7 Allen, 128, 129 (88 Am. Dec. 670). In the elaborate and able opinion delivered in the last cited case by Bigelow, C. J., the court said: 'If it be doubtful whether a clause in a deed be a covenant or condition, courts of law will always incline against the latter construction. Conditions are not to be raised readily by inference or argument. * * * We believe there is no authoritative sanction for the doctrine that a deed is to be construed a grant on a condition subsequent, solely for the reason that it contains a clause declaring the purpose for which it is intended the granted premises shall be used, where such purpose will not inure specially to the benefit of the grantor and his assigns, but is in its nature for the general public, and where there are no other words indicating an intent that the grant is to be void if the declared purpose is not fulfilled.' "

Sec. 264. Conditions subsequent—Conveyance in consideration of support. A deed from parents to a child which recites that the land is conveyed to the grantee "by his agreeing to support his father and mother," which clause is followed by particular specifications of the nature and character of the support, among which it is provided that the grantors are to have "use and occupancy of the dwelling" on the land conveyed, creates a conditional estate and upon conveyance by the grantee the estate passes charged with the performance of his agreement. *Ringrose v. Ringrose*, 170 Pa. 598 (88 Atl. Rep. 129). Where land is conveyed to one on condition that he support the nephew of the grantor when he "shall be unable to provide for himself" the beneficiary cannot maintain an action for a breach of this agreement unless he shows affirmatively that he is unable to support himself. *Burcham v. Burcham*, 12 Ind. App. 625 (40 N. E. Rep. 28). Where one has conveyed property to another person in consideration of the support and maintenance of the grantor during his or her natural life, and the grantee refuses to perform his or her agreement, a court of equity will grant relief by rescinding the contract and cancelling the deed. *Cooper v. Gam*, 152

Ill. 471 (89 N. E. Rep. 267); but a grantor cannot have his deed made in consideration of a life support set aside where the grantee is ready and willing to perform her agreement but is prevented from doing so by his abandonment of the premises. *Scott v. Scott*, 89 Wis. 98 (61 N. W. Rep. 286). Where one executes a deed for land, upon which he is residing, to his daughter and her husband and retains possession of the same agreeing to have it recorded, he cannot, after a part performance by his grantees of their contract, abandon the premises and cancel the deed. *Decker v. Decker*, Ia. (61 N. W. Rep. 921). Where a conveyance is made by a father to his son on the consideration that the latter will support the former and his wife, and the instrument shows an intention to charge the real estate for the performance of such duty, the creditors of the grantee cannot subject the land to their claims to the injury of grantors although a lien on the land for such support is not expressly reserved in the conveyance. *McClure v. Cook*, 89 W. Va. 579 (20 S. E. Rep. 612). Where the consideration of a deed given for life support is contained in a separate written contract between the parties, it and the deed must be construed together as one instrument. *Norton's Adm'r v. Perkins*, 67 Vt. 208 (81 Atl. Rep. 148). In an action of ejectment brought against his grantee by the grantor in a deed given for life support, the defendant cannot show that the conveyance was made for the purpose of defrauding creditors. *Norton's Adm'r v. Perkins*, 67 Vt. 208 (81 Atl. Rep. 148). A deed reserving to the grantor the right to live on the land during his life, providing for the support of his minor children out of its proceeds, and the grantee to pay certain sums named to said children, and upon his performance of all the conditions, the legal title to invest in him absolutely, was held to create a condition subsequent. *Bank of Suisun v. Stark*, 106 Cal. 202 (89 Pac. Rep. 581).

Sec. 265. Merger. Merger is not favored in equity, and is never allowed, unless for special reasons, and to promote the intention of the party. *McLaughlin v. McLaughlin*, 80 Md. 115 (80 Atl. Rep. 607). The rule that where the same person becomes the owner of both the dominant and servient estate the easement in favor of the dominant estate is

thereby extinguished cannot be permitted to operate against a third party, claiming an interest in such easement, even though such third party be merely a mortgagee. *Duval v. Becker*, 81 Md. 537 (82 Atl. Rep. 808). Where two decrees of foreclosure are rendered in the same action in favor of different persons under different obligations, neither will merge in the other upon becoming the property of one person. *Mattlass v. Sundin*, Ia. (62 N. W. Rep. 662). The inheritance of an estate by one who has an equitable lien thereon, the two interests not being coextensive and commensurate, though a merger takes place at law, it is not the necessary result in equity. "Equity will not permit a merger except in accordance with the intention of the acquirer of the two interests or estates and if he has expressed no intention, will look to the circumstances of the transaction to ascertain what is for his advantage and will presume his intention to be in accordance therewith." *Dodge v. Hogan*, R. I. (31 Atl. Rep. 268). Citing, 2 Pom. Eq. Jur., §§ 787-791; *Knowles v. Carpenter*, 8 R. I. 553; *Duffy v. McGuinees*, 13 R. I. 595; *McGale v. McGale*, Index 00, 157 (29 Atl. Rep. 967).

Sec. 266. Merger—Conveyance taken by lienholder. The doctrine of merger will not be applied to a conveyance of the legal title taken by a mortgagee where it would operate to defeat the priority of his lien. *Swatts v. Bowen*, 141 Ind. 322 (40 N. E. Rep. 1057); *Gibbs v. Johnson*, 104 Mich. 120 (62 N. W. Rep. 145); *Chase v. Van Meter*, 140 Ind. 321 (39 N. E. Rep. 455). In the last case the court say: "One equity will not swallow up another. One may have as many equitable claims upon a piece of land as he can obtain, and they will all subsist without merger, for it may take them all to make a complete equitable title; but when the holder of any one or all of these equitable claims is invested with the legal title, there being no reason for keeping them alive, they are deemed merged in the greater title. 4 Kent Comm. (12th Ed.) *99, § 5." "The true test of merger is the intention of the party, either expressed or implied. If the intention has not been expressed, it will be sought for and ascertained in all the circumstances of the transaction. If it appears from all

the circumstances to be for the benefit of the party acquiring both interests that merger shall not take place, but that the equitable or lesser estate shall be kept alive, then his intention that such a result will follow will be presumed, and equity will carry it into execution by preventing a merger. If, from all the circumstances, a merger would be disadvantageous to the party, then his intention that it should not result will be presumed. Pom. Eq. Jur., § 788; Jones, Mortg., 870-878; *Elston v. Castor*, 101 Ind. 426, 442 (51 Am. Rep. 754); *Haggerty v. Byrne*, 75 Ind. 499; *Hanlon v. Doherty*, 109 Ind. 87 (9 N. E. 782); *McClain v. Sullivan*, 85 Ind. 174; *Thomas v. Simmons*, 108 Ind. 588 (2 N. E. Rep. 208; 8 N. E. Rep. 881); 15 Am. & Eng. Enc. Law, 815, note 1; Boone, Mortg. 141-143. 'It may therefore be deduced from the authorities, as a general rule, that when the mortgagee acquires the equity of redemption in whatever way, and whatever he does with his mortgage, he will be regarded as holding the legal and equitable titles separately, if his interest requires this severance. The law presumes the intention to be in accordance with his real interest, whatever he may have at the time seemed to intend.' Jones, Mortg., § 878."

Where one holding under conveyance in fact a mortgage, having full knowledge of the rights of the mortgagor, conveys to his wife and as her agent fraudulently induces the mortgagor to do likewise, the mortgage does not merge in her title. *Miller v. Whelan*, 158 Ill. 544 (42 N. E. Rep. 59). The court say: "A court of equity will prevent or permit a merger, as will best subserve the purposes of justice and the actual and just intention of the parties; and it will prevent a merger for the purpose of promoting substantial justice, or to thwart the accomplishment of a fraud or other unconscientious wrong. The rule that the intention is the controlling consideration will not have application in a court of chancery as being necessarily paramount to all other considerations, and that rule will not be permitted to be used for the accomplishment of fraud, or of injustice and wrong to others under the color of legal forms. And that court will not apply the technical doctrine of merger when the just interests of the parties require a mortgage to be kept alive. 15 Am. & Eng. Enc. Law, tit. "Merger";

2 Pom. Eq. Jur., § 794; *Fowler v. Fay*, 62 Ill. 375; *McClain v. Weise*, 22 Ill. App. 272."

ESTOPPEL.

EPITOME OF CASES.

Sec. 267. Estoppel by deed or decree. A person cannot accept and reject the same instrument, or, having availed himself of it as to part, defeat its provisions in any other part; and this applies to deeds, wills, and all other instruments whatsoever. *Fox v. Windes*, 127 Mo. 502 (80 S. W. Rep. 323). In order for a recital in a deed or lease to work an estoppel, the instrument must be so executed as to be binding on both parties. *Chicago & A. R. Co. v. Keegan*, 152 Ill. 413 (39 N. E. Rep. 33). A void instrument cannot create an estoppel. *Louisville, St. L. & T. Ry. Co. v. Stephens*, 96 Ky. 401 (29 S. W. Rep. 14; 49 Am. St. Rep. 803). Recitals in deeds are binding upon parties and privies but not upon strangers to the deed. *Heard v. Nix*, 96 Ga. 51 (23 S. E. Rep. 122). The estoppel of a judgment binds the privies as well as the parties. *Cox's Ex'rs v. Crockett*, 92 Va. 50 (22 S. E. Rep. 840). A party to a suit may be estopped by the averments of his pleadings. *Winn v. Strickland*, 84 Fla. 610 (16 So. Rep. 606). See Former adjudication. Where the trial of an action involving the question whether or not certain security deeds from the defendant to the plaintiff were void because of usury in the debts they had been given to secure resulted in a judgment which necessarily adjudicated in the plaintiff's favor that these deeds were free from usury, and were valid and binding upon the defendant, the latter's wife, upon whose application a homestead in the land covered by the deeds had been set apart after they were executed, was estopped from attacking the deeds on the ground of the alleged usury. *Ezzard v. Estes*, 95 Ga. 712 (22 S. E. Rep. 713). A trustee who enters into possession of lands conveyed to him in trust, cannot claim adversely to the title under which he enters

and the principles of estoppel applies to the relation between trustee and *cestui qui trust* and prevents the former from repudiating the contract by virtue of which he is in possession. *Guilfoil v. Arthur*, 158 Ill. 600 (41 N. E. Rep. 1009). An agreement to sell certain lands, in case they are acquired by the promisor, and divide the proceeds with another, is not such a conveyance as operates an estoppel, when title is subsequently obtained by him. *Oliphant v. Burns*, 146 N. Y. 218 (40 N. E. Rep. 980). One who conveys land to a body claiming to be a corporation is estopped from denying its corporate character in order to defeat the instrument. *Ricketson v. Galligan*, 89 Wis. 894 (62 N. W. Rep. 87).

268. Estoppel by deed as against grantee. In a recent case the supreme court of Wisconsin say: "The grantee in a deed poll, by accepting it, becomes bound by its terms as completely and absolutely as the grantor, and it will operate as an estoppel against him by reason of its acceptance, as fully as against his grantor. *Lowber v. Connit*, 86 Wis. 176; *Hutchinson v. Railway Co.*, 87 Wis. 582; *Hubbard v. Marshall*, 50 Wis. 327 (6 N. W. Rep. 497); *Orthwein v. Thomas*, Ill. (18 N. E. Rep. 564); *Bowman v. Griffith*, 85 Neb. 861 (58 N. W. Rep. 140). The case of *Hutchinson v. Railway Co.*, 41 Wis. 541, shows that there is no valid reason why a corrected conveyance from the grantor 'should not have the same effect as though the correction had been made by the judgment of a court of equity, instead of the voluntary act of the parties interested.' In *Emeric v. Alvarado*, 64 Cal. 529, 587 (2 Pac. Rep. 418), where the grantees in deeds of specific lands by metes and bounds accepted a conveyance of an undivided interest in a tract of land which in terms declared that it was in lieu of the previous deeds conveying such specific portion of the same land, it was held that the grantees were estopped from claiming under the previous deeds, upon the ground that they could not hold under the lieu deed and against it too; that they could not blow hot and cold, or assume inconsistent positions; and that whether they were divested of whatever title was conveyed by the original deeds without a reconveyance was immaterial. This is according to the maxim, '*Allegans contraria non est audiendus*.'

Broom, Leg. Max. 129." *Chloupek v. Perotka*, 89 Wis. 551 (62 N. W. Rep. 587; 46 Am. St. Rep. 858). A grantee who accepts a deed and takes the benefits arising therefrom will not be heard to deny that the person negotiating the purchase was his agent. *Johnson v. East Car L. & Ry. Co.*, 116 N. C. 926 (20 S. E. Rep. 28). A mortgagor is estopped to deny his title as recited in his mortgage. *Mitchell v. Kinnard*, Ky. (29 S. W. Rep. 809).

Sec. 269. Estoppel in pais — General principles. In order to constitute an estoppel *in pais* the party relying thereon must have been misled by the acts or conduct constituting such estoppel. *National Union Bank v. Nat. Mechanics' Bank*, 80 Md. 871 (80 Atl. Rep. 913; 45 Am. St. Rep. 850; 27 L. R. A. 476). False representations cannot create an equitable estoppel in favor of one who has knowledge of the truth. *Brigham Young Trust Co. v. Wagner*, 12 Utah 1 (40 Pac. Rep. 764). To constitute an equitable estoppel the facts pleaded must be of such a character as to constitute a cause of action in favor of the party pleading them. *Brigham Young Trust Co. v. Wagner*, 12 Utah 1 (40 Pac. Rep. 764). To constitute estoppel by conduct, it must appear that there was a representation concerning material facts, made, with the knowledge of the facts, to a party ignorant of the truth of the matter, with the intention that it should be acted upon; and it must appear that it was acted upon. Fraud, or something tantamount thereto, is said to be a distinctive characteristic of this kind of estoppel. *Salem Natl. Bank v. White*, 159 Ill. 136 (42 N. E. Rep. 812). The doctrine of estoppel *in pais* has no application where everything is equally known to both parties, or where the party sought to be estopped was ignorant of the facts out of which his rights sprung, or where the other party was not influenced by the acts pleaded as an estoppel. *Ross v. Banta*, 140 Ind. 120 (39 N. E. Rep. 782). Acts done in good faith under a mistaken belief as to one's rights cannot create an estoppel. *Gillespie v. Gillespie*, 159 Ill. 84 (42 N. E. Rep. 805); but one may be estopped by representations which have been relied upon in reference to a boundary, although the representation was an honest error. *Ross v. Ferree*, Ia. (64

N. W. Rep. 688). One having the legal title to land is not estopped to assert the same by reason of his having purchased the equitable title of another at a sheriff's sale. *Windsor v. Bacon*, 7 Houst. (Del.) 1 (80 Atl. Rep. 688). A landowner is estopped to question the validity of a judgment which he induces another to purchase on his representation that it is a valid lien against his land which he will pay, the purchaser relying upon such representation and granting an extension of time for payment, the judgment being an apparent lien upon the land, but not in fact valid. *Viergutz v. Aultman, Miller & Co.*, 46 Neb. 141 (64 N. W. Rep. 698).

Where a father and son are both involved in the same litigation, in compromise of which the son executes a mortgage upon the land to which he has no title with the knowledge and consent of his father, the latter is estopped to defeat the foreclosure of such mortgage by claiming title to the land. *Hampton v. France*, Ky. (82 S. W. Rep. 950). Where a senior mortgagee, relying upon the representation of a junior mortgagee who has foreclosed his mortgage but has not taken possession, to the effect that he will not redeem in case of foreclosure of the senior mortgage, takes a quit claim deed of the premises instead of foreclosing his mortgage, such junior mortgagee will be estopped from claiming any interest in the land under his mortgage. *Hardy v. City of Keene*, N. H. (82 Atl. Rep. 759). Where a railway company retains in its possession a deed for the right of way obtained by its agent and proceeds to construct its grade upon the land, it will be estopped to avoid the conditions imposed by such deed or to claim that it has not accepted such deed. *Louisville, St. L. & T. Ry. Co. v. Taylor*, 96 Ky. 241 (28 S. W. Rep. 666). Where a complainant, at a time when his mental faculties were weakened by disease, was induced by false and fraudulent representations to convey land to the defendant, and shortly thereafter became mentally unfit to attend to business, and his wife upon discovery of the fraud commenced a suit in chancery, in his name, to recover the land of a would-be purchaser from the fraudulent grantee, having notice of the suit, inquired into the specifications of fraud and was satisfied that they were untrue, and also inquired of the wife and learned from her only what was contained in the bill,

and subsequently the wife discovered other evidence of fraud and caused the bill to be amended accordingly and finally succeeded in setting aside the conveyance upon the proof and the specifications of fraud contained in the amendment, it was held that the complainant was not estopped by the answers made by the wife to the inquiries made by the expectant purchaser. *Turner v. Houpt*, 58 N. J. Eq. 526 (88 Atl. Rep. 28). In a recent case the supreme court of West Virginia say. "An estoppel *in pais* operates where a person has made an admission or done an act with intent to influence the conduct of another, or that he has reason to believe will influence his conduct, inconsistent with the evidence he proposes now, or with the claim or title he proposes to set up, where the other party has been influenced by and has acted upon it, and where he would be prejudiced by the allowance of the claim or title set up." *Cates v. Swiger*, 40 W. Va. 420 (21 S. E. Rep. 874). Citing, Pom. Eq. Jur., § 804; *Cowles v. Bacon*, 21 Conn. 451 (56 Am. Dec. 871); *Drew v. Kimball*, 48 N. H. 282 (80 Am. Dec. 168); *Iron Co. v. Trout*, 88 Va. 397 (2 S. E. Rep. 718). For cases which depend upon particular facts and illustrate the doctrine of estoppel *in pais*, see *Knapp v. Paine*, Ia. (68 N. W. Rep. 575); *Nicholas-Steuart v. Crosby*, 87 Tex. 448 (29 S. W. Rep. 880); *Monland v. Frick Coke Co.*, 170 Pa. St. 33 (32 Atl. Rep. 684).

Sec. 270. Accepting benefits—Acquiescence in the wrong. It is a general rule that where one accepts the benefit of a transaction he is estopped to question its validity. *Cameron v. Coy*, 165 Pa. St. 290 (80 Atl. Rep. 848); *Church v. Johnson*, Ia. (61 N. W. Rep. 916); *Cochran v. Thomas*, 181 Mo. 258 (38 S. W. Rep. 6). One who accepts the privileges, benefits and fruits of a void judgment of divorce is thereby estopped from claiming the invalidity of such judgment in order to possess himself of the property of a deceased companion. *Marvin v. Foster*, 61 Minn. 154 (68 N. W. Rep. 484). A trustee who is a party to a trust deed, who has accepted the trust created by said deed, with a knowledge of the consideration upon which the same was made, and by virtue of the same has taken and held possession

of the trust property for a long period of years, in acquiescence to the provisions thereof, is, when a suit is brought against him to establish the trust and require him to account for the trust property, estopped from maintaining as a defense to said suit that the trust deed was executed upon an illegal consideration, or that it was defectively executed. If a party having the right to repudiate or affirm a transaction, affirms it, he cannot afterwards resort to the right of repudiation. Impeachable transactions may be rendered valid by act of confirmation or acquiescence for a great length of time. It is the duty of a party discovering a fraud to take immediate steps for a rescission of his contract. By his ratification of the acts of which he complains, and to which he was a willing party, he is forever estopped from setting up such defense. *Sanders v. Richard*, 85 Fla. 28 (16 So. Rep. 679). An owner of land who sells to a railroad company a right of way for its road by a written contract in which the description of the land is indefinite, and after the road is constructed, accepts, with full knowledge of the facts and without objection, the compensation to be paid, and acquiesces for a period of six years in the occupancy by the company of the right of way on which the road is so constructed, is estopped to deny that such location is the location originally agreed upon, and to demand additional compensation. *Columbus & E. Ry. Co. v. Williams*, 53 O. St. 268 (41 N. E. Rep. 261). Mere silence or acquiescence by one who is ignorant of his rights in land cannot operate to convey his title by estoppel. *Stone v. Engstrom*, R. I. (82 Atl. Rep. 916); *DeBerry v. Wheeler*, 128 Mo. 84 (30 S. W. Rep. 838). The creditor who acquiesces in the transfer of his debtor's property will be estopped to assail such transfer on the ground of fraud. *Vaughn v. Comet Consol Min. Co.*, 21 Colo. 54 (39 Pac. Rep. 422); *Thomson v. Cohen*, 127 Mo. 215 (28 S. W. Rep. 984).

Sec. 271. Acquiescence in voidable judicial proceedings—Elements of equitable estoppel. Where a mortgagor abandons the land and acquiesces in an invalid foreclosure of the mortgage under power of sale given therein, for a period of twenty years, during which time the debt and the right to foreclose is barred by the statute of limitations, and

the land passes into the hands of innocent purchasers, he will be estopped to assert any title on account of the invalidity of such foreclosure. *Diamond v. Manhiem*, 61 Minn. 178 (68 N. W. Rep. 495). The court say: "The equitable doctrine of estoppel by conduct, which is altogether different from technical legal estoppels *in pais*, so far from being odious, is a favored doctrine of the courts. Equitable estoppel, in the modern sense, arises from the 'conduct' of a party, using that word in its broadest meaning, as including his spoken or written words, his positive acts, and his silence or negative omission to do anything. Its foundation is justice and good conscience; its object is to prevent the unconscientious and inequitable assertion or enforcement of claims or rights which might have existed or been enforceable by other rules of the law, unless prevented by the estoppel; and its practical effect is, from motives of equity and fair dealing, to create and vest opposing rights in the party who obtains the benefit of the estoppel. Pom. Eq. Jur., § 802. *Horn v. Cole*, 57 N. H. 287 (12 Am. Rep. 111). While originally the creature of equity, it is now thoroughly incorporated into the law, and is as available in a legal action as in an equitable one; and while at one time the courts hesitated to apply the doctrine so as to give or divest an estate or interest in land, as being opposed to the letter of the statute of frauds, yet is it now well settled that a person may by his conduct estop himself from asserting his title to real property, as well as to personalty, although, as applied to the former, the doctrine should be carefully and sparingly applied, and only on the disclosure of clear and satisfactory grounds of justice and equity. Equitable estoppel has been defined as, 'the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, of contract, or of remedy, as against another person, who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right either of property, of contract, or of remedy.' Pom. Eq. Jur., § 804. But while certain general requisites are held essential to create an equitable estoppel, yet the courts have always been cautious, as in the matter of defining fraud, not

to give a definition of universal application without modification or limitation, and without reference to the peculiar facts of a particular case. The authorities are, however, substantially all agreed upon the following general propositions: First. To create an estoppel, the conduct of the party need not consist of affirmative acts or words. It may consist of silence or a negative omission to act when it was his duty to speak or act. Second. It is not necessary that the facts must be actually known to a party estopped. It is enough if the circumstances are such that a knowledge of the truth is necessarily imputed to him. Third. It is not necessary that the conduct be done with a fraudulent intention to deceive, or with an actual intention that such conduct will be acted upon by the other party. It is enough that the conduct was done under such circumstances that he should have known that it was both natural and probable that it would be so acted upon."

A mortgagor who acquiesces in his mortgagee's holding possession under a voidable foreclosure sale until an action on the debt would be barred by the statute of limitations, is estopped to deny the right of such mortgagee to have his debt satisfied out of the land. *Lucas v. American F. M. L. Co.*, 72 Miss. 866 (16 So. Rep. 858).

Sec. 272. Standing by—Holder of record title. It is held that a landowner cannot stand by while a ditch is being constructed at a heavy expense, or aid in its construction, and receive compensation therefor, and make no objection, and then recover damages for the diversion of water from his premises when he knew or ought to have known that this would be the result of the construction of the ditch. *Southern Marble Co. v. Darnell*, 94 Ga. 231 (21 S. E. Rep. 531.) A stockholder of a water company who stands by while the inhabitants of the city—which is supplied with water by his company—call and hold an election to authorize the common council to purchase the plant of the company, and also while negotiations for such purpose are carried on for more than two years during which time proceedings for condemnation of said plant are taken and carried through to judgment, without objection by him, will be held guilty of laches in equity in the absence of fraud. *Brady v. Atlantic City*, 58 N. J. Eq. 440

(82 Atl. Rep. 271). The silence of a mortgagee whose mortgage is of record and who stands by and knowingly permits another to purchase the land without disclosing his claim, does not estop him from asserting the superior lien of the mortgage. *Porter v. Wheeler*, 105 Ala. 451 (17 So. Rep. 221). The court say: "The presumption is right and just that an intending purchaser examines the records touching the title of his vendor, and it is right and just to impute to him notice or knowledge of all the record may disclose. If the examination is not made, whatever of loss may result is attributable to his negligence, and not to the fault of him who has on the record a paramount claim of title. The law is well settled that one having a title of record, so long as he may do no affirmative act to mislead or deceive, is under no further duty to those who may acquire subsequent rights, and will not be barred from the assertion of his title. He may know or be informed that others are proposing or negotiating for rights and interests in property bound by his title of record. He is under no obligation to inquire for or hunt them up and warn or apprise them of that which the record discloses, and it is their duty to ascertain." Citing, *Bigelow Estop.* 594; *Steele v. Adams*, 21 Ala. 584; *Brinckerhoff v. Lansing*, 4 Johns. Ch. 65; *Rice v. Dewey*, 54 Barb. 455; *Brambel v. Kingsbury*, 89 Ark. 181; *Rector v. Board of Improvement*, 50 Ark. 116 (6 S. W. Rep. 519.)

Sec. 273. Married women — Estoppels in favor of husband's creditors. The mere fact that a wife permits her husband to hold the legal title to her land at a time when credit is extended to him on the faith of his apparent ownership, but without her knowledge, will not estop her from asserting her ownership as against her husband's creditors who thus extended credit. *DeBerry v. Wheeler*, 128 Mo. 84 (80 S. W. Rep. 888; 49 Am. St. Rep. 488). The court say: "Equitable estoppel arises 'when one, by his words or conduct, wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position.' In such case 'the former is concluded from averring against the latter a different state of things as existing at the time.' To make this estoppel

complete, it is said, three things must combine, 'namely, fraudulent representation, or withholding the truth when duty requires one to speak; reliance on the expressed or implied representation by the party defrauded; and the consequent act taken by the defrauded person.' Bish. Mar. Wom. § 487. Again, it is said by another author: 'It must appear that the party making the admission, by his declaration or conduct, was apprised of the true state of his own title; and that others were acting in ignorance of it; and that he intended to deceive, or was culpably negligent in the nonassertion of his rights; that the other party had no knowledge, or means of acquiring knowledge, of the true state of the title, and that he relied upon such admission to his injury.' Herm. Estop. § 987."

Sec. 274. Estoppel in pais as against the public. A city may be estopped from opening platted streets by permitting the abutting owners to improve the same at a great expense and occupy adversely for an unreasonable length of time, it also appearing that there was no public necessity for the street. *Paine Lumber Co. v. Oskosh*, 89 Wis. 449 (61 N. W. Rep. 1108). Where a street has been dedicated, but the lines thereof have been so established as to include a portion of the street with the abutting lots, and the owners of the lots improve the same and the city causes sidewalks to be built in accordance with the mistaken line, and the same are used for a number of years, the city will be held to be estopped from claiming the benefit of the dedication as to so much of the street as has thus been occupied by the abutting owners. *Johnson v. Burlington*, Ia. (63 N. W. Rep. 694).

Sec. 275. Title by estoppel—After-acquired title. Title will pass by estoppel where the owner of the legal title induces another to make valuable improvements upon the faith of a dedication or disclaimer of ownership. *Des Moines & Ft. D. R. Co. v. Lynd*, Ia. (62 N. W. Rep. 806). A covenant of warranty in a deed cannot operate by estoppel to confer upon the grantee greater title than the deed itself would have conferred if effective. *Chace v. Gregg*, 88 Tex. 552 (82 S. W. Rep. 520). Where the conveyance even though with covenants of warranty does not purport to convey an indefeasible estate but only the present interest of the

grantor, the doctrine of estoppel does not apply to and pass an after-acquired title even though no title passes by such conveyance. *Miller v. Miller*, 140 Ind. 174 (89 N. E. Rep. 547). One executing a deed of trust is estopped to assert an after-acquired title. *Ivy v. Yancey*, 129 Mo. 501 (81 S. W. Rep. 987). After-acquired titles of a warranting grantor inure to the benefit of his grantee. *Sayre v. Sheffield L. I. & C. Co.*, 106 Ala. 440 (18 So. Rep. 101). A state is not estopped to assert an after-acquired title to lands conveyed by its officers without authority. *Salem Imp. Co. v. McCourt*, 26 Ore. 98 (41 Pac. Rep. 1105). A provision in a deed conveying land as follows: "And we further hereby convey any and all other real estate in the town of Pownal that we or either of us own or possess, or any interest that we or either of us may have in any other real estate in said Pownal," does not pass an after-acquired title. *Paddock v. Potter*, 67 Vt. 860 (81 Atl. Rep. 784). Under Ia. Code. § 1981, which provides that "where a deed purports to convey a greater interest than the grantor was at the time possessed of, any after-acquired interest of such grantor, to the extent of that which the deed purports to convey, inures to the benefit of the grantee," it is held that an after-acquired interest does not inure to the benefit of the grantee to whom it was not intended to be conveyed, and who gave no consideration therefor, and did not understand himself to be receiving more than the interest possessed by his grantor. *Cook v. Prindle*, Ia. (68 N. W. Rep. 187).

EVIDENCE.

ALABAMA STATE LAND CO. V. THOMPSON.

(104 Ala. 570.)

Evidence--Alteration of deed. A grantee who has fraudulently altered his deed will be permitted to introduce it in evidence for the purpose of establishing his title, but he will not be permitted to derive any benefit from the alteration. A distinction is made between instru-

ments which evidence executed rights and those which evidence rights which are only executory.

MCCLELLAND, J.

Sec. 276. Statement of the case. This is an action of ejectment. The demise relied upon is laid in John Swan and John A. Billups, trustees, etc. The defendants in respect of a part of land sued for—the N. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$, and the S. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$, of section 28, township 11, range 6, lying in Etowah county, Ala.—claimed title through a deed from said Swan and Billups to Shaw, bearing date March 18, 1878; and, title in Swan and Billups having been shown by plaintiff, they offered this deed in evidence. Its introduction was objected to by the plaintiff on the ground “that it shows on its face that it has been mutilated, and upon the further ground that the clause, ‘minerals reserved,’ in the deed, has been erased by a pen.” This objection was overruled; the deed was admitted; plaintiff was cast as to this land; and reserving exceptions to this ruling, and also to the judgment, which was without jury, now appeals to this court. The original deed from Swan and Billups to Shaw accompanies this record for our inspection. It is a printed form, prepared especially for conveyances by Swan and Billups, as trustees of the Alabama & Chattanooga Railroad lands. In the body of this deed are four erasures of printed matters. It was in the contemplation of the draughtsman of this form that the lands would be sold for cash in part, and on credit for the balance, and that purchasers would execute their notes for the deferred payments. Hence, in the form, there is a reference to notes executed by the purchaser. But Shaw paid cash in full, as is shown by the recitals, and that part of the deed referring to the notes is erased. Again, the form contemplates a sale to two or more persons, and in it there is a reference to the purchasers “or either of them.” Shaw was the sole purchaser in this instance; and therefore the words “or either of them” are erased. The other two erasures are of the words “minerals reserved,” where they occur at two places in the form. The context of the deed fully explains the first two erasures, but not so in respect to the last two. And we feel safe in concluding affirmatively that the former were made at the time the printed

form was filled out, and before the execution of the deed. A presumption to like effect in respect of the latter would be indulged, if it were not for certain suspicious facts apparent on the face of the deed, and the conclusions to which those facts force as to the time of those erasures, and by whom made. These facts and conclusions are: (1) That the erasures appear not to have been made with the same pen in the two classes of instances, the mark being much heavier upon the words "minerals reserved," certainly in one place, than in either of the other instances. (2) That the erasures are not made in the same way. In erasing the reference to notes and the words "or either of them," a single line only is drawn through them; but in one instance two or three, and in the other certainly three, lines are drawn through the words "minerals reserved." (3) That the last erasure of the words "minerals reserved" appears to have been made after the blank deed had been filled out, inasmuch as the erasing lines pass over the top of the letter "S" in Shaw's name in the succeeding line. (4) That, in the absence of explanation, we must conclude that these erasures were made after the others, and therefore after execution, and while the paper was in the possession of the defendant or Shaw, through whom they claim. And, (5) the erasure being of benefit to the defendant, we must further conclude they were made by him or Shaw, and for a fraudulent purpose. Upon the face of the deed, therefore, suspicion attaches to the erasures of the words "minerals reserved," and, so far from this suspicion being removed by evidence aliunde going to show that these erasures were made at or before execution, the only evidence adduced bearing on the question was that in behalf of the plaintiff, to the effect that Shaw had made a written application for the sale of this land to him, and in it had embodied a reservation of the mineral interests, or, in other words, had proposed to buy and pay for all interests in the land, except the minerals. This evidence goes strongly to support plaintiff's theory that the minerals were intended to be, and were in fact, reserved in the sale and conveyance by Swan and Billups to Shaw; and upon it, in connection with the circumstances of suspicion apparent on the face of the deed in respect of the erasures of the words of reservation, we have no hesitation in reaching the conclu-

sion that the lower court erred, at least in respect of rendering judgment for the defendant for the land including the minerals, or, rather, in not entering judgment for the plaintiff for the mineral rights and interest in the realty.

Sec. 277. Admissibility of altered deed—Distinction between executed and executory rights. Whether the Shaw deed should have been received at all in evidence is another question. That it should not have been received as evidence of defendant's title to the minerals, in the absence of sufficient explanation on his part of the erasure of the words "minerals reserved," is, of course, clear, because, *prima facie*, the alterations in question being upon the considerations to which we have averted, of a suspicious character, evidenced by the face of the instrument, the deed, until the suspicions were removed by satisfactory explanation, was to be taken, if admissible at all, as if it contained the erased words, which reserved title to the mineral deposits to the grantors. But whether the paper was evidence of Shaw's title to the land, exclusive of the minerals, is a more difficult question. It is a familiar law that the effect of an unauthorized alteration of an instrument in a material part by one not a stranger to it, after its execution, ordinarily, is the destruction of the paper, in such sort that no rights under it can be asserted, and no rights between the parties can be proved by it. *Sharpe v. Orme*, 61 Ala. 263; *Hill v. Nelms*, 86 Ala. 442 (5 So. Rep. 796); *Barclift v. Treece*, 77 Ala. 528, *Anderson v. Bellenger*, 87 Ala. 334 (6 So. Rep. 82; 4 L. R. A. 680; 13 Am. St. Rep. 46); *Montgomery v. Crossthwait*, 90 Ala. 553 (8 So. Rep. 498; 24 Am. St. Rep. 832); *Saint v. Manufacturing Co.*, 95 Ala. 362 (10 So. Rep. 539; 36 Am. St. Rep. 210); *Hollis v. Harris*, 96 Ala. 288 (11 So. Rep. 377). A paper so altered is no longer the paper which was signed by the party sought to be charged, and he cannot be held to the obligation originally evidenced by it. This is true in respect of all executory instruments. Their destruction in this way is the destruction of the rights they were intended to secure and evidence. There is, however, a well-recognized distinction in this connection between this class of instruments and those which merely evidence a complete and fully executed transaction,

and even between those parts of the same instrument which are as to some matters executory, and as to others executed, in the sense of being a mere memorial of an accomplished and existing fact. The distinction, so far as it has been fully recognized and established, goes only to this extent: Where the right is executory and the instrument securing and evidencing it is thus altered, not only is the paper, as evidence of the right, destroyed, but the right itself is also destroyed; while on the other hand, where the instrument merely evidences an executed transaction, and is a memorial of it, the rights which vested by virtue of that transaction in the person who spoliates the instrument are not thereby destroyed or divested, whatever may be the effect of the spoliation upon the memorial itself. There is some question whether the distinction goes further than this. Some courts hold that not only is the right which has passed by such an executed instrument unaffected by this kind of destruction of the paper—as it would be unaffected by the physical obliteration of the paper—but also that the paper itself, eliminating the unauthorized alterations of it, continues to be a memorial of the right or title, and may be adduced in evidence to prove the passing and vesting of such right or title. The recognized distinction is fully illustrated in the case of an altered conveyance of realty containing covenants. The alteration does not divest the title which has passed by the instrument into the grantee, any more than the actual destruction of the paper would; but it destroys all the grantee's rights under the covenants, and also, of course, the paper, as evidence of the covenants. And the mooted distinction turns upon the inquiry whether, in such case, the altered deed may still be adduced in evidence of the title which passed by it in its original form.

Sec. 278. Same — Conflict of authorities — As to when the admissibility of such deed will be limited to proof of title. The following cases hold, directly or in principle, that while a party does not divest himself of title to land by an unauthorized alteration in a material part of the deed by which it was conveyed to him, yet he cannot adduce such deed in evidence to prove such conveyance, and the existence of title in himself, but must prove the conveyance by other

evidence; *Babb v. Clemson*, 10 Serg. & R. 419; (18 Am. Dec. 684); *Withers v. Atkinson*, 1 Watts, 286; *Chesley v. Frost*, 1 N. H. 145; *Newell v. Mayberry*, 8 Leigh. 250 (28 Am. Dec. 261); *Bliss v. McIntyre*, 18 Vt. 466 (46 Am. Dec. 165); *Batchelder v. White*, 80 Va. 103. To the contrary, in *Doe v. Hirst*, 8 Stark 60, an altered deed, though said by the court to be void, was admitted to show title in the party who had altered it, because the alteration did not divest the title which had originally passed by the instrument. And the cases of *Jackson v. Gould*, 7 Wend. 364, and *Lewis v. Payn*, 8 Cow. 71 (18 Am. Dec. 427), tend to support the same view. In Elphinstone's Interpretation of Deeds is this text: "There is a distinction between those deeds, or clauses of a deed, which have a continuing effect or are executory, such as a covenant to pay a sum of money, and those which produce their full effect at the instant of execution, such as a conveyance of land. No case can be found in which a deed or clause of the latter nature has been prevented from having full effect because the deed was altered after execution; so that an altered deed may be given in evidence to prove any effect produced by it at the instant of execution, or of any right which existed aliunde, of which it is evidence. * * * A deed which has been materially altered by a defendant may be given in evidence by him." Page 19; citing *Pattinson v. Luckley*, L. R. 10 Exch. 880. And in *Insurance Co. v. Fitzgerald*, 16 Q. B. 440, Lord Campbell, C. J., said: "There is no ground for saying that if a deed be altered in a material part it is rendered void from the beginning. It ceases to have any new operation, and no action can be brought in respect of any pending obligation which would have arisen from it had it remained entire; but it may still be given in evidence to prove a right or title created by its having been executed, or to prove any collateral fact." And to the same effect are the following cases: *Davidson v. Cooper*, 11 Mees. & W. 778; *Lord Ward v. Lumley*, 5 Hurl. & N. 87, and *Hutchins v. Scott*, 2 Mees. & W., 815, 816. This view, we conceive, is the more reasonable and the sounder in principle. The contrary doctrine is based on the idea that a deed so altered is void *ab initio*, and for all purposes. This cannot be true, for such deed is confessedly valid when executed, else title could not have passed by it, and all authorities agree that

title does pass and is not divested by the subsequent alteration. All authorities agree also that, notwithstanding the unauthorized erasure or interlineation, it is open to the grantee named in the paper to show by any competent evidence the fact of the passing of title into him. In other words, he may and must show that a deed conveying the land to him was executed by the grantor named in the altered paper. He must prove the execution and contents of a deed, and this, of course, by the best evidence the case admits of. He cannot resort to parol evidence of the contents of a paper which has not been lost or physically destroyed, but, on the contrary, is then in his possession and in court. The paper itself, regardless of a signature to it, would be the best evidence of its own contents. Nor can he resort to parol evidence to show execution of a paper which is in court, purports to be signed by the grantor and which bears the solemn, official certification required by the statute, that the person whose name appears to be signed to it admitted and acknowledged that he executed the instrument. The certificate of acknowledgment would of itself be the very best and only competent evidence of the fact of execution. It is upon him to prove a deed as that deed existed the moment after its execution was completed by delivery to him. He has that deed as it then existed, duly acknowledged in his possession. Nobody questions it. All that is shown is that certain words which were in the deed at that time have been marked across without authority. The words themselves are still visible and legible in the paper. His adversary says to him: "The paper you have and offer, including the words you have attempted to erase, is my deed." He offers this paper, including those words. Could there possibly be any better—or, indeed, any other competent—evidence of the contents of such a deed than the deed itself; or, of its execution, than the statutory acknowledgment appended to it? We think not, and accordingly hold that the trial court did not err in receiving this deed in evidence to show title in the defendant to the land described in it, excepting only the minerals in said land. To the other part of the land involved here the defendant claimed title by adverse possession under color and claim of title for more than ten years before suit brought. We have carefully considered the evidence of such possession

adduced on the trial, and upon it we concur with the trial court in finding the defense made out and affirm the judgment in favor of plaintiff, and in favor of defendant, in so far as it relates to lands not mentioned in the Shaw deed. As to the lands in suit mentioned in the Shaw deed, the judgment will be reversed, and judgment will be here rendered in favor of the plaintiff for all the minerals in the same. One-half of the costs of appeal in this court and the court below will be paid by each of the respective parties. Affirmed in part, reversed and rendered in part.

Sec. 279. Alterations of deeds—Effect upon their validity and admissibility in evidence. Upon the points decided in this case there seems to be a great diversity of opinion, and not a little confusion. In a recent case the supreme court of New Jersey held that a deed which had been presumably altered, after its delivery, by the party claiming under it, was void. *Jones v. Crowley*, 57 N. J. L. 222 (30 Atl. Rep. 871). The court say: "Whatever may be the rule in other jurisdictions, the law is settled in this state that if a deed be altered by the party to whom it belongs, even though in an immaterial part, such alteration avoids the deed as a consequence. It was so decided by this court as early as the year 1824, in *Den v. Wright*, 7 N. J. L. 175. This decision was approved in 1883, in *VanAuken v. Hornbeck*, 14 N. J. L. 179; and more recently, in 1891, in *Hunt v. Gray*, 35 N. J. L. 227. In the case last cited, Chief Justice Beasley says: 'The reasons for this rule are obvious, and of the most solid character. In its absence the inducement to fraud would be very strong, and public policy requires that, in the language of Lord Kenyon, 'no man shall be permitted to take the chance of committing a fraud without running any risk of losing by the event when it is detected.' Even immaterial alterations are fatal, as the rule, to be efficacious, cannot permit a person to tamper in any degree with the written contract of another in his possession." This decision is supported by *Ex Parte Sayre*, 95 Ala. 288 (11 So. Rep. 378). In both of these cases, however, the title never vested in the party in whose interest the alteration was made as in the case reported.

In another recent case it is held that a mortgage which had been fraudulently altered after its execution and delivery, by a party claiming under it was void. *Powell v. Pearlstine*, 43 S. C. 403 (21 S. E. Rep. 328). The court say: "It seems to us that the proposition that the fraudulent alteration of any instrument in writing renders the whole instrument void is so well settled by authority that little need be said upon the subject. We need not go outside of our own state for authority. In addition to the cases of *Mills v. Starr*, 2 Bailey 359, and *Burton v. Pressly*, Cheves, Eq. 1, cited by respondents' counsel, see *Vaughn v. Fowler*, 14 S. C. 355; *Kennedy v. Moore*, 17 S. C. 464; *Plyler v. Elliott*, 19 S. C. 257—all of which sustain the above proposition." In this case the party guilty of the fraud

was seeking to enforce the mortgage, and was not simply offering the altered instrument in evidence as proof of a valid link in his title. One who wrongfully obtains possession of a deed executed in blank, and without the knowledge or consent of the grantors places the name of another therein as grantee, and records the deed, such person does not obtain any title. *Golden v. Hardesty*, Ia. (61 N. W. Rep. 913). See Ballards' Annual, Vol. 3, § 165.

Sec. 280. Presumptions as to alterations. In Iowa it is held that an alteration apparent upon the face of a writing raises no presumption that it was made after delivery and without authority, and that the burden is not upon him who relies upon the instrument to explain the alteration, but upon him who attacks it to prove that the alterations were made after delivery and without authority. *Mages v. Allison*, Ia. (63 N. W. Rep. 322); Citing, *Hagan v. Merchants' & Bankers' Ins. Co.*, 81 Ia. 321 (46 N. W. Rep. 1114). In the latter case the court say: "The rule that an alteration apparent on the face of the writing raises no presumption either way is in our opinion, well supported by reason and authority, and in harmony with the rule that the law does not presume guilt. If the instrument shows upon its face, as it is possible it may, that the alteration was fraudulent, then it proves more than the mere fact of alteration; but when the fact of alteration alone appears from it, and it is silent as to the time or authority by which it was made, there is no evidence upon which to base the presumption that it was fraudulently done." Upon this point there has been much conflict of authority with a tendency toward the relaxation of the old rule. 1 Dev. on Deeds, § 463; Pingrey on Real Prop., § 1279; Dembitz on Land Titles, ch. 5, § 46, p. 327; Tiedeman on Real Prop., § 790; 10 Am. Dec. 273, note.

In a well considered case the supreme court of Minnesota say: "The doctrine that the presumption of law is that the alteration was made after delivery and that the burden is on the holder in the first instance to explain it, seems to us to be unsound as well as harsh. Presumptions of law, if indulged in, should be in favor of innocence rather than guilt. Moreover, all disputable presumptions of law are based upon the experienced course of human conduct and affairs, and are but the result of the general experience of a connection between certain facts, the one being usually found to be the companion or effect of the other. Hence such presumptions ought to be conformable to the experience of mankind, and the inferences which, in the light of that experience, men would naturally draw from a given state of facts. Now it is a matter of common knowledge that at the present day every man is, to a certain extent, his own lawyer; and that the laymen frequently draw their own contracts without much regard to form, in which erasures and interlineations are the rule rather than the exception. Indeed the same thing is unfortunately true of many instruments which come from the hands of lawyers. It is also a matter of common knowledge that printed blanks are now in general use for almost all kinds of contracts, and that it is the common practice, even with many lawyers, in case the blank does not

conform to the actual agreement of the parties, to erase and interline without making any notation that this was done before execution. Whatever might have been the fact formerly, when but few men could write, and when contracts were usually drawn by skilled conveyancers or scriveners with great care and wholly unsuited to the business habits or usages of this country at the present day. The mere existence of an interlineation or erasure in an instrument would not naturally or ordinarily produce an inference in the minds of men that it had been fraudulently altered after execution. Indeed, unless the alteration was of such a suspicious character as to furnish intrinsic evidence to the contrary, we think the natural inference would be that it was a legitimate part of the instrument and was made at or before its execution. We are therefore of opinion that the correct rule is that the burden is upon the maker to show that the alteration was made after delivery, or, perhaps, to state the proposition with more precision, the proof or admission of a signature of a party to an instrument is *prima facie* evidence that the instrument written over it is his act, and this *prima facie* evidence will stand as binding proof unless the maker can rebut it by showing by evidence that the alteration was made after delivery; and that the question when, by whom, and with what intent the alteration was made is one of fact to be submitted to the jury upon the whole evidence, intrinsic and extrinsic."

Wilson v. Hayes, 40 Minn. 531 (42 N. W. Rep. 467; 4 L. R. A. 196). Under Ga. Code, § 2712, which makes registered deeds admissible in evidence without further proof, it is held that where alterations appear to have been made in such a deed, it will be presumed that such alterations were made at or before the time of its execution. *Collins v. Boring*, 96 Ga. 360 (23 S. E. Rep. 401).

EPITOME OF CASES.

Sec. 281. Judicial notice — Presumptions. Where the state collects taxes off of land of one in adverse possession it will be presumed that the state has parted with its title. *Bushby v. Florida Cent. & P. R. Co.*, S. C. (23 S. E. Rep. 50). Courts take judicial knowledge of the seal of the state, and a deed executed by the governor under the seal of the state is admissible without other proof of its execution. *Chicago & A. R. Co. v. Keegan*, 152 Ill. 418 (39 N. E. Rep. 83). Courts take judicial notice of the boundaries of an incorporated city and of the location and course of a river frequently mentioned in the public statutes of the state. *DeBaker v. Southern Cal. Ry. Co.*, 106 Cal. 257 (39 Pac. Rep. 610; 46 Am. St. Rep. 237); *Kansas City v. Vineyard*, 128 Mo. 75 (30 S. W. Rep. 326). Courts do not take judicial

notice of the location of the boundary lines of a particular patent. *Goodwin v. Scheerer*, 106 Cal. 690 (40 Pac. Rep. 18). The seal of a corporation aggregate affixed to the deed is of itself *prima facie* evidence that it was so affixed by the authority of the corporation; especially if it is proved to have been put to the deed by an officer who was intrusted by the corporation with the custody of such seal. And it lies with the party objecting to the due execution of the deed to show that the corporate seal was affixed to it surreptitiously or improperly, and that the preliminary steps to authorize the officer having legal custody of the seal to affix it to the deed had not been complied with. *Owers v. Olathe Silver Min. Co.*, 6 Colo. App. 1 (39 Pac. Rep. 980). Citing, *Lovett v. Association*, 6 Paige 60; *Kyd. Corp.*, 268; *Ang. & A. Corp.*, 115; *Clarke v. Coke Co.*, 4 Barn. & Adol. 815; *Whart. Ev.* 694; *Doe v. Chambers*, 4 Adol. & E., 410; *Burrill v. Bank*, 2 Metc. (Mass.) 166; *St. John's Church v. Steinmetz*, 18 Pa. St. 273. From the fact that the state has issued a patent for a certain tract of land in section 22 of a specified governmental township to an alleged purchaser, which patent recites the act of congress whereby there was granted to the state for school purposes sections 16 and 36 in each township, but contains no other recitals as to the acts or proceedings whereby the state acquired its title to the land described, it cannot be presumed that the state was the owner of the land at the date of the patent or at any other time. *Butler v. Drake*, 62 Minn. 229 (64 N. W. Rep. 559).

Sec. 282. Presumptions of death from absence. In a recent case the supreme court of Illinois say: "The rule is well established that absence for seven years, without the whereabouts being known, and without having been heard from during that period, raises, at the expiration of that time, the presumption of death. *Whiting v. Nicholl*, 46 Ill. 237; *Johnson v. Johnson*, 114 Ill. 611 (8 N. E. Rep. 282; 55 Am. Rep. 888); *Lawson*, Pres. Ev. rule 48, and cases cited. When, however, a thing is shown to exist, its continuance is presumed until the contrary is shown or a conflicting presumption arises. Hence, unless it be shown that death occurred prior to the expiration of the seven years' absence, or

some conflicting presumption arises from the facts proved which would overcome the presumption of the continuance of life, the presumption of life would obtain until the full expiration of the period, when the contrary presumption of death, from the continued absence would arise. While, therefore, it is true that there is no presumption that death occurred at any particular time within the seven years, it is also true that, in the absence of contravening facts or controlling presumptions, it will be presumed that life continued during the entire period. *Clarke v. Canfield*, 15 N. J. Eq. 119; *Montgomery v. Bevan*, 1 Sawy. 660, Fed. Cas. No. 9,735; *Burr v. Sim*, 4 Whart. 150; *Eagle's Case*, 3 Abb. Pr. 218; *Hancock v. Insurance Co.*, 62 Mo. 26; *Dean v. Bittner*, 77 Mo. 101; *Hopewell v. DePinna*, 2 Camp. 113; *Whiteside's Appeal*, 23 Pa. St. 114." *Reedy v. Millizen*, 155 Ill. 636 (40 N. E. Rep. 1028).

Sec. 283. Parol evidence—Contradicting written. Parol evidence is admissible to show the true date of a deed although a different date is given. *Moore v. Smead*, 89 Wis. 558 (62 N. W. Rep. 426). As between the parties, it may be shown by parol evidence that a mortgage, expressing a consideration, was in fact without "any" consideration. Andrews, C. J., dissenting. *Baird v. Baird*, 145 N. Y. 659 (40 N. E. Rep. 222). As a general rule the provisions of a contract for the sale or exchange of land are merged in the deed and parol evidence cannot be used either at law or in equity for the purpose of contradicting, adding to, subtracting from, or varying the terms of the deed or controlling its legal operation and effect, except where it is impeached for fraud or where it is sought to be reformed or where it clearly appears that it was the intention of the party that the deed was only a partial execution of the contract. *West Boundary Real Estate Co. v. Bayless*, 80 Md. 495 (31 Atl. Rep. 442). Parol evidence is not admissible to annul or substantially vary the terms of a written instrument, except on the ground of fraud or mistake. *Brunson v. Henry*, 140 Ind. 455 (39 N. E. Rep. 256). New parties cannot be made to a written contract by parol evidence. *Burwits v. Jeffers*, 108 Mich. 512 (61 N. W. Rep. 784). In the absence of fraud, parol evidence is inadmissible to show that there was no consideration for a

deed for the purpose of invalidating it, when the deed recites a consideration on its face. *Magee v. Allison*, Ia. (63 N. W. Rep. 322). Where an instrument shows on its face that it is a mortgage, parol evidence is not admissible to show that it is a conditional sale. *Eckford v. Berry*, 87 Tex. 415 (28 S. W. Rep. 937).

Sec. 284. Parol evidence—Explaining contracts. In order that parol evidence may be heard to explain a written contract there must be an apparent incompleteness on the face of the contract and the parol evidence must be consistent with and not contradictory of the written instrument. *House v. Walch*, 144 N. Y. 418 (39 N. E. Rep. 327). Where the issue was whether or not the defendant held as owner or tenant, his right to testify to an oral contract of purchase is not barred by execution of a subsequent written contract by which he incidentally recited that he held possession as tenant. *Corbin v. Thompson*, 12 Ind. App. 511 (40 N. E. Rep. 824). It is held that parol evidence is admissible to show that a portion of the real estate intended to be conveyed by a sheriff's deed was omitted therefrom by inadvertence, but in such a case the proof of the alleged error must be clear. *Gladish v. Godchaux*, 46 La. 1571 (16 So. Rep. 451).

Sec. 285. Parol evidence—Collateral and subsequent contracts. It may be shown by parol evidence that the reservation of a life estate by grantors was made to secure payment of the unpaid purchase money, payable in support, and allowing grantors to reside on the premises. *Bever v. Bever*, 144 Ind. 157 (41 N. E. Rep. 944). Where, in an action for slander of title, plaintiff alleges that his failure to consummate a written contract to sell all his land was due to defendant's false representations concerning the title, the contents of such contract may be proven by parol. *Carden v. McConnell*, 116 N. C. 875 (21 S. E. Rep. 923). Parties may, by oral agreements made after the execution of a written contract, change, alter, or abridge it altogether, or where the instrument, on its face, shows that all its terms are not included in the writing, those terms and provisions may be proven by parol. It is equally as well recognized and established a principal of evidence that, where the instrument

embodying the contract between two or more contracting parties is complete in itself, it is never permitted by oral testimony to add to, vary, or modify the instrument by showing the existence of an agreement not expressed in writing. *Davis v. Scovern*, 180 Mo. 808 (32 S. W. Rep. 986). Where a conveyance of a right of way to any railroad authorizes the grantee to take so much land as was sufficient for its roadway, ditches, etc., evidence of a parol agreement by the grantee to pay for all the land used in excess of a certain amount, in addition to the express consideration, is admissible. *Johnson v. East Car. L. & Ry. Co.*, 116 N. C. 926 (21 S. E. Rep. 28).

Sec. 286. Declarations and admissions. The declarations of a former owner of land are not admissible as against those claiming under him when made after he has conveyed the land. *Consolidated Tank-Line Co. v. Pien*, 44 Neb. 887 (62 N. W. Rep. 1112); *Matteson v. Hartman*, 91 Wis. 485 (65 N. W. Rep. 58); *Emmons v. Barton*, 109 Cal. 662 (42 Pac. Rep. 808). This rule applies to a grantor who reserves a life estate and remains in possession of the land. *Robins v. Spencer*, 140 Ind. 483 (40 N. E. Rep. 263). See Ballards' Annual, Vol. 3, § 617. Declarations in disparagement of one's title after he has parted with it are inadmissible to affect those holding under him. *Bowden v. Achor*, 95 Ga. 243 (22 S. E. Rep. 254); *Kurtz v. St. Paul & D. R. Co.*, 61 Minn. 18 (63 N. W. Rep. 1). Declarations made by a grantor after the execution of his deed upholding the title conveyed by it are admissible in a suit to enforce title under such deed. *Miller v. Meers*, 155 Ill. 284 (40 N. E. Rep. 577). Subsequent declarations of the donor, made to third persons, are admissible to rebut the presumption that a gift by a parent to a child was intended as an advancement. *Gunn v. Thurston*, 180 Mo. 839 (32 S. W. Rep. 654). In an action by personal representatives to foreclose a mortgage, the declaration of the mortgagee to the effect that there was no consideration for the mortgage are admissible. *Baird v. Baird*, 145 N. Y. 659 (40 N. E. Rep. 222). Where a deceased person had peculiar means of knowledge his declarations as to a corner tree or boundary may be admitted. *Fry v. Stowers*, 92 Va. 13 (22 S. E. Rep. 500). In an action of ejectment, where the

defense is adverse possession, declarations by a deceased party, through whom the defendants claim title, and who the evidence tends to show was at the time in the possession of the premises in dispute, to the effect that he was the owner thereof, are competent as tending to characterize his possession, and to show that it was under claim of title in himself. *Brown v. Kohout*, 61 Minn. 118 (68 N. W. Rep. 248). Under a statute (Cal. Code Civ. Proc, § 448) which makes a failure to deny by affidavit the genuineness and due execution of a written instrument made a part of an adverse pleading an admission of the same, such admission extends only to the due execution and genuineness of the instrument in question and not to its legal effect. *Carpenter v. Shinnars*, 108 Cal. 859 (41 Pac. Rep. 478).

Sec. 287. Opinions—Admissibility of. A witness who admits that he cannot identify a particular tract of land as being included in a given written description will not be allowed to give his opinion that the land was so included. *Holleran v. Meisel*, 91 Va. 148 (21 S. E. Rep. 658). On an issue of one's mental capacity, a non-expert witness, who testifies that he has had opportunity to judge of such capacity, may state that it "was good;" but it is improper for him to testify that the person in question could not be influenced by "any power on earth." *Smith v. Smith*, 117 N. C. 848 (28 S. E. Rep. 270). Opinion evidence is admissible as to the mental condition of a person where the witness shows acquaintance with the person and opportunity for observation, and that he has observed. *Stumph v. Miller*, 142 Ind. 442 (41 N. E. Rep. 812). For a collection of recent cases on the admissibility of opinions in real actions, see *Ballards' Annual*, Vol. 2, § 541, and Vol. 3, § 621.

Sec. 288. Deeds—Proof of their execution. By the attestation clause of a deed it appeared that the same was "signed, sealed, and delivered" in the presence of two witnesses. One of the subscribing witnesses, making affidavit for the purpose of having the deed admitted to record, only swore, that he saw the grantor "sign" the same, and "acknowledged that he did so for the purpose therein mentioned," and that affiant and the other subscribing witness "signed the

same as witnesses." Construing this affidavit, together with the attestation, it sufficiently proves the execution of the deed to admit it to record. It is not the policy of the law to nullify records wherever substance is found, and obvious clerical errors and technical omissions should be disregarded. A substantial compliance with the statute is sufficient. *Jackson v. Haisley*, 35 Fla. 587 (17 So. Rep. 631). The execution of receipts by the receivers of the United States land offices must be proven before the same can be admitted in evidence. *Yellow River R. Co. v. Harris*, 35 Fla. 885 (17 So. Rep. 568). A deed may be offered in evidence although the seal of the officer taking the acknowledgment is not affixed. *Rullman v. Barr*, 54 Kan. 643 (39 Pac. Rep. 179). It is held that the certificate of acknowledgment of a mortgage is sufficient *prima facie* evidence to entitle it to be read in evidence in an action to foreclose the same although its execution was denied under oath in the answer. *Krom v. Vermillion*, 148 Ind. 75 (41 N. E. Rep. 539). To prove the execution of a deed by a man and his wife the original contract of sale signed by them is admissible in evidence, though not acknowledged as recorded by law; and the notes payable to the grantors in said deed are also admissible for the same purpose where they are precisely such notes as would have been given under a deed in payment of the purchase price. *Carr v. H. C. Frick Coke Co.*, 170 Pa. 62 (32 Atl. Rep. 656).

Sec. 289. Deeds made pursuant to judicial sales. Where a deed made under a decree by a commissioner or other authority is offered in evidence as a connecting link in the plaintiff's chain of title to land, it is necessary to introduce with it so much of the record of the suit in which such decree was made as will satisfactorily show that the person having the legal title to the land conveyed was a party to the suit, and as will identify the land conveyed with the land decreed. As against a party who claims against the deed and is a stranger thereto, the recital of such facts therein, without more, is not evidence thereof, and the deed does not prove the transfer of the title to the land it purports to convey. *Mc-Dodrill v. Pardee & Curtin L. Co.*, 40 W. Va. 564 (21 S. E. Rep. 878).

Sec. 290. Records—Exemplification of within and without the state. Illinois Rev. Stat. 1898, ch. 51, § 18, provides that “records of courts may be proved by a copy thereof certified under the hand of the clerk of the court having custody thereof.” It is held that this section applies to foreign judgments and decrees and abrogates the necessity of a certificate from the presiding judge that the attestation is in due form. *Garden City Sand Co. v. Miller*, 157 Ill. 225 (41 N. E. Rep. 758). Where a statute authorizes the appointment of a deputy in an office having the custody of records, a certificate or authentication of a copy of the record by such deputy is sufficient to admit the same in evidence. *Garden City Sand Co. v. Miller*, 157 Ill. 225 (41 N. E. Rep. 758). A document signed by the registrar of the state land office, certified by him to be a correct copy of a patent which issued from that office, is admissible in evidence to show the date of the sale of the land by the state. *LeBleu v. North American Land & Tit. Co.*, 46 La. 1465 (16 So. Rep. 501). Under the statute of the state of New York entitled “Of the proof and recording of conveyances, and the cancellation of mortgages” (1 Rev. St. N. Y. ch. 8, Marg. p. 756), which expressly classes mortgages on real estate, as “conveyances of real estate,” and includes them within that term; and which provides also, that, when duly acknowledged and proved, they may be read in evidence without any further proof; and which also provides that the record thereof, when duly recorded, in accordance with the statutes of that state, in the office of the clerk or register of the county wherein the lands lie, or a transcript thereof, duly certified, may be read in evidence with like force and effect as the original—the record of a mortgage on real estate is a record, within the scope and meaning of the term “records,” as used in article 4, § 1, of the constitution of the United States and it can be exemplified under the act of congress of March 27, 1804, and read and used in evidence in the courts of this state with the same faith and credit, and with such force and effect, as is given the record by the statute of the state of New York. *Chase v. Caryl*, 57 N. J. L. 545 (31 Atl. Rep. 1024).

Sec. 291. Pleadings and decrees. Under Ill. Rev. Stat. 1893, ch. 116, § 13, which declares that in suits under the burnt record act a sworn answer shall have no other or greater weight as evidence than the petition, such an answer is not evidence as in ordinary equity suits. *Miller v. Stalker*, 158 Ill. 515 (42 N. E. Rep. 79). A judgment on a note rendered in one state after the beginning of an action in another state on the same note, and to foreclose a mortgage securing it, is admissible in the last named suit when properly certified. *Morris v. Burgess*, 116 N. C. 40 (21 S. E. Rep. 27). Where the title of the plaintiff in a suit touching land has been made out in order for him to recover, and it consists, according to his own showing, of a lengthy chain of conveyances, the record of a decree in favor of one of his predecessors in title aiding or supplying a particular link in the chain is competent evidence in his behalf, though the defendant in the suit on trial was not a party to the suit in which the decree was rendered. But although the record of the decree recites the perfect links in the chain, and it was necessary for them all to appear in order to obtain the decree, the record will not suffice, as against a stranger, to prove any of these links; it will serve only to aid or supply the particular link which without the decree would be defective or absent. As to the other links, the record of the decree indicates on its face the existence of better evidence than the record affords, and this better evidence must be produced or accounted for. *Bussey v. Dodge*, 94 Ga. 584 (21 S. E. Rep. 151).

Sec. 292. Judgment as evidence against strangers. In an action on an insurance policy, the insurer having proved a divestiture of the plaintiff's interest in the insured property by virtue of foreclosure proceedings and a deed pursuant thereto before the loss, it was held error to receive in evidence as against the insurer, a judgment annulling the foreclosure proceedings obtained in an action commenced subsequent to the loss and to which the insurer was not a party and of which he had no notice, for the purpose of establishing the fact that such foreclosure proceedings were void, and thus defeat the defense that the insured had no insurable interest in the property at the time of the loss. *Tierney v. Phoenix*

Ins. Co., 4 N. Dak. 565 (62 N. W. Rep. 642). The court say: "It is urged that the case falls within the rule that a judgment is always evidence against a stranger when relied upon by any person as a muniment of title. This rule is well settled. *Barr v. Gratz's Heirs*, 4 Wheat. 218 (4 L. Ed. 558); 1 Greenl. Ev. § 589; 1 Whart. Ev. § 821; Freem. Judgm. § 416. But the facts of this case do not bring it within this rule. The utmost scope of the doctrine is that a person establishing his title may offer in evidence a judgment in the chain of title, although neither the plaintiff nor the defendant in the action in which judgment is offered in evidence was a party thereto. But such judgment can never be used as evidence when the same is hostile to the claim of the other party. It cannot be received as proof against the title of the one by whom it is offered. The plaintiff, to make his right in ejectment, must affirmatively prove his own title. To do this he may use any judgment in the chain of his title, the same as a conveyance. But the moment he attempts by means of such judgment to cut off the right of the defendant—to oppose to his claim of title an adjudication inimical to such claim—the general rule applies that the judgment is evidence of its own existence, and no more. To illustrate the distinction, we will take the case of a contest between two persons claiming remotely, under different conveyances, from a common grantor. The plaintiff, to establish his *prima facie* title, may put in evidence all judgments in his claim of title subsequent to the deed under which he claims. These judgments in no manner affect the defendant or prejudice his rights. His contest reaches back to a period antedating them all. He attacks the deed from the common grantor under which plaintiff claims, and that alone. The plaintiff merely uses the subsequent judgments to show that he has succeeded to the interest of the grantee in the deed so assailed. He puts them in evidence the same as any ordinary conveyance. See *Barr v. Gratz's Heirs*, 4 Wheat. 218–220 (4 L. Ed. 558); Freem. Judgm. § 416. But an entirely different case would be presented, and one calling for the application of a radically different principle, if the plaintiff should seek to defeat the original deed from the common grantor under which defendant claims, by a judgment annulling such deed, in an action to which defendant was not a party,

rendered after defendant had bought the property. In such a case the defendant, being neither a party nor a privy, would not be bound by such judgment, and it could not be received in evidence to destroy his title. To allow it the effect to cut off the defendant's rights would be to accord to it a wider operation than the mere establishment of plaintiff's title. It would in such a case not only be a muniment of plaintiff's title, but also a conclusive barrier to defendant's claim to the property."

Sec. 293. Mortuary tables—Value of life estate. In determining a life tenant's interest in damages for injury to the estate the standard mortuary tables are admissible in evidence in connection with expert testimony of computations based on such tables. *City of Joliet v. Blower*, 155 Ill. 414 (40 N. E. Rep. 619). The court say: "The standard and recognized mortuary or life tables are competent testimony, in connection with other evidence, for the purpose of showing the expectancy of life, and the present value of a life estate or annuity, and also in estimating damages, and in apportioning a burden or damage or benefit between a life tenant and the remainderman or reversioner. Such testimony is admissible as well before a jury in an action at law as before the chancellor in a suit in equity. But such tables do not furnish absolute and conclusive rules for the guidance of either court or jury, and the doctrine is that they are to be considered along with all the circumstances in proof and given weight accordingly. *Jackson v. Edwards*, 7 Paige 886; *Williams' Case*, 8 Bland 186-221; *Schell v. Plumb*, 55 N. Y. 592; *Sauter v. Railroad Co.*, 66 N. Y. 50 (28 Am. Rep. 18); *Wager v. Schuyler*, 1 Wend. 553; *Donaldson v. Railroad Co.*, 18 Iowa 280 (87 Am. Dec. 891); *Walters v. Railroad Co.*, 41 Iowa 71; *Gallagher v. Railway Co.*, 67 Cal. 13 (6 Pac. Rep. 869); *Railroad Co. v. Crosby*, 74 Ga. 788; *Hunn v. Railroad Co.*, 78 Mich. 513 (44 N. W. Rep. 502; 7 L. R. A. 500); *Railroad Co. v. Putnam*, 118 U. S. 545 (7 Sup. Ct. 1); *Scheffler v. Railroadway Co.*, 32 Minn. 518 (21 N. W. Rep. 711); *Roose v. Perkins*, 9 Neb. 304 (2 N. W. Rep. 715; 31 Am. Rep. 409); *City of Lincoln v. Smith*, 28 Neb. 762 (45 N. W. Rep. 41); *Mills v. Catlin*, 22 Vt. 98."

Sec. 294. Miscellaneous notes—Statutes construed. One claiming to be owner of land cannot prove his title by showing that he has redeemed the land, as owner, from a tax sale. *Ivey v. Griffin*, 94 Ga. 689 (21 S. E. Rep. 709). One who as a witness to a deed attests that it was "signed, sealed and delivered" in his presence may testify to facts which will show its non-delivery. *Johnson v. Johnson*, 44 S. C. 864 (22 S. E. Rep. 419). A deed is not rendered inadmissible in evidence on account of the fact that the record thereof does not agree with the original. *Carr v. H. C. Frick Coke Co.*, 170 Pa. 62 (82 Atl. Rep. 656). In an action to establish a lost instrument the proof as to the contents of the operative parts of such instrument, should be clear and satisfactory. *Fries v. Griffin*, 85 Fla. 212 (17 So. Rep. 66). A survey for the owner's convenience is not admissible evidence for him or those claiming under him; but it is competent to explain the testimony of a witness and the same is true of diagrams and plats; and when the record is silent as to the purposes of their admission it will be presumed that they were admitted for a proper purpose. *Riddle v. Germantown*, 117 N. C. 887 (28 S. E. Rep. 882). In an action on an appeal bond to recover the rental value of premises for a given period a lease of the premises previous to that time was held admissible in evidence to show such rental value. *Vincent v. Defield*, Mich. (68 N. W. Rep. 802).

Under N. J. Revision, p. 156, § 15, where a deed is recorded more than ten years after it is dated neither the record nor a certified copy thereof is admissible in evidence. *Jones v. Crowley*, 57 N. J. L. 222 (80 Atl. Rep. 871). In determining the question of advancements in a suit for partition, it is held that Mo. Rev. St. § 8918, which provides that, "where one of the original parties to the contract or cause of action in issue and on trial is dead, * * * the other party to such contract or cause of action shall not be admitted to testify, either in his own favor or in favor of any party to the action claiming under him," prohibits one heir from testifying that money received by him from the deceased was a gift, and not an advancement, but he can testify to this effect in the case of money received by another party; these questions being separate issues, and independent of the general questions

involved. *Gunn v. Thurston*, 180 Mo. 889 (82 S. W. Rep. 654). Ala. Code, § 1798, applied—admission of recorded deeds in evidence. *Postal Tel. Cable Co. v. Brantley*, 107 Ala. 688 (18 So. Rep. 821).

EXECUTION SALES.

EPITOME OF CASES.

Sec. 295. As to what interest may be sold on execution. An equitable interest in real estate not coupled with possession cannot be subjected to execution only by equitable proceedings brought for that purpose. *Shoemaker v. Harvey*, 43 Neb. 75 (61 N. W. Rep. 109). Where a judgment debtor is divested of the title to real estate before his creditor has acquired any lien thereon such real estate is not subject to sale upon execution. *Bayer v. Walsh*, 166 Pa. St. 88 (30 Atl. Rep. 1089). Property belonging to a municipality which is exempt from execution under Ala. Code, 1886, § 2514, on account of being used for municipal purposes, does not lose its exemption by being temporarily used for private purposes. *Murphree v. Mobile*, 104 Ala. 532 (16 So. Rep. 544). A judgment creditor may maintain an action to have a deed of his debtor declared a mortgage and his interest in the land subjected to the judgment after the satisfaction of the mortgage. *Dunton v. McCook*, Ia. (61 N. W. Rep. 977).

Sec. 296. Issue, levy and return of execution. Executions must issue from the court having control of the judgment. *Willamette Real-Estate Co. v. Hendrix*, 28 Ore. 485 (42 Pac. Rep. 514). The issue and levy of an execution before there has been a judgment duly rendered and entered of record is void. *Winter v. Coulthard*, Ia. (62 N. W. Rep. 782). A levy constitutes the acts by which a sheriff sets apart and appropriates for the purpose of satisfying the command of a writ of execution a part or the whole of a defendant's property. *Burkett v. Clark*, 46 Neb. 466 (64 N.

W. Rep. 1118). In the absence of a statutory provision providing that a levy on real estate shall be made a matter of record it is held that it is not necessary that a levy be endorsed upon the writ, but a sufficient levy is shown where the return of the writ contains a copy of the notice of sale which recites a valid levy under the writ. *Herr v. Broadwell*, 5 Colo. App. 467 (39 Pac. Rep. 70). Errors of description in a levy cannot affect the sale unless it appears that some one has been misled, and injury resulted thereby. *Wildasin v. Bare*, 171 Pa. 387 (33 Atl. Rep. 365). Where the levy describes the property levied upon with such accuracy as to clearly distinguish the same from other property of like character, and with such particularity as to render the same capable of exact identification by extrinsic evidence, the levy is, in law, sufficiently certain as to the matter of description. *Collins v. Boring*, 96 Ga. 360 (23 S. E. Rep. 401). A levy of an order of attachment on real property by posting a copy thereof is not effective, as against third parties, when there is an occupant of such property. *Shoemaker v. Harvey*, 48 Neb. 75 (61 N. W. Rep. 109). Where the description in the return, order of sale, advertisement, and deed is not sufficient to designate the land, or to notify the owner and the public of the sale of the land, the sale is void. *Tatum v. Croom*, 60 Ark. 487 (30 S. W. Rep. 885). Citing, *Freem. Ex'ns*, § 280; *Shoemaker v. McMonigle*, 86 Ind. 422; *Pfeiffer v. Lindsay*, 66 Tex. 123 (1 S. W. Rep. 265). Ala. Code, §§ 3359-3362 applied—order of sale on execution, issued by a justice of the peace. *Johnson v. Dismukes*, 104 Ala. 520 (16 So. Rep. 424). Neb. Comp. Stat. 1895, §§ 6077-6095, 6101, construed and applied—levy, appraisement and sale. *Burket v. Clark*, 46 Neb. 466 (64 N. W. Rep. 1113). Pa. Act April 10, 1862, P. L. 364, applied—distribution of proceeds. *Campbell v. McCleary*, 166 Pa. St. 1 (30 Atl. Rep. 1132).

Sec. 297. Appraisement and notice. Until the contrary is shown it will be presumed that an officer making the sale performed his duty in regard to appraisement. *Lytton v. Baird*, 141 Ind. 446 (40 N. E. Rep. 1063). A finding "that the appraisement returned with the execution contained only an appraisement of the real estate" is not equivalent to a find-

ing that the appraisement of the rents and profits was not contained therein. *Lytton v. Baird*, 141 Ind. 446 (40 N. E. Rep. 1063); Ind. Rev. Stat. 1894, §§ 744, 746, applied—appraisement—incumbrances. *Ross v. Banta*, 140 Ind. 120 (39 N. E. Rep. 732). A statute (Pa. Act June 16, 1836, § 68, P. L. 772) requiring the publication of notice “once a week during three successive weeks” does not require that the first notice shall be three full weeks, or twenty-one days, before the sale. *Hollister v. Vanderlin*, 165 Pa. St. 248 (30 Atl. Rep. 1002); Mo. Rev. Stat. 1889, § 4943, applied—notice to owner. *Harness v. Cravens*, 126 Mo. 233 (28 S. W. Rep. 971); Mass. Pub. Stat., ch. 172, § 46; Rev. Stat., ch. 73, § 39, applied—notice of sale. *Holmes v. Jordan*, 163 Mass. 147 (39 N. E. Rep. 1005).

Sec. 298. Manner, time and place of sale. Where the service of an execution on land has been commenced by a sheriff, the sale may be completed by his successor without a writ of *venditioni exponas*. *Lewis v. Bartlett*, 12 Wash. St. 212 (40 Pac. Rep. 934; 50 Am. St. Rep. 885). Where a statute (Ala. Code, § 2907) exists requiring the sale to be made at the court house of the county and the legislature subsequently creates a city court having co-ordinate authority with the other courts of the county, it is held that a sale may be made at the court house where the city court is held. *Annis-ton Pipe Works v. Williams*, 106 Ala. 324 (18 So. Rep. 111). In Pennsylvania, the court may in its discretion adjourn an execution sale. *Hollister v. Vanderlin*, 165 Pa. 248 (30 Atl. Rep. 1002). Mass. Pub. Stat., ch. 27, § 114; ch. 172, § 29, construed and applied—sale of land—authority of constable. *Lewis v. Norton*, 164 Mass. 209 (41 N. E. Rep. 290).

Sec. 299. Sales in parcels or in solido. An action at law cannot be maintained to set aside a sale made in bulk which should have been made in parcels where the purchaser has paid the purchase price and removed liens until his equitable rights have been determined. McClellan, J., dissenting. *Annis-ton Pipe Works v. Williams*, 106 Ala. 324 (18 So. Rep. 111). Particular facts upon which it is held that a sale *in solido* will not be enjoined. *Hellams v. Patton*, 44 S. C.

454 (22 S. E. Rep. 608). See Ballards' Annual, Vol. II, § 240; Vol. III, § 880.

Sec. 300. Sheriff's deed. A conveyance of "all the right, title, or interest" of the debtor is sufficient, and will prevail over a prior unrecorded deed by him. *Parker v. Prescott*, 87 Me. 444 (82 Atl. Rep. 1001). A sheriff's deed relates back to the date of the lien the enforcement of which procured its execution and cuts off all subsequent liens. *First Nat. Bank v. Lieuallen*, Idaho (89 Pac. Rep. 1108). If the deed includes the interest of the judgment debtor the fact that it includes more does not invalidate it. *Finch v. Turner*, 21 Colo. 287 (40 Pac. Rep. 565). Where one entitled to receive a deed dies, the subsequent execution of it to him, although void, does not affect the title of those claiming under him. *Diamon v. Turner*, 11 Wash. St. 189 (89 Pac. Rep. 879).

Sec. 301. Title, rights and liabilities of purchaser. The rule of *caveat emptor* applies to a purchaser of real estate at a judicial sale thereof on execution; and the conveyance made in pursuance thereof conveys no greater estate than would a quitclaim deed for the real estate, executed by the execution debtor. *Butler v. Fitzgerald*, 43 Neb. 192 (61 N. W. Rep. 640; 27 L. R. A. 252). Where land which has been fraudulently conveyed is sold on execution against the fraudulent grantor, the purchaser obtains all the title of such grantor burdened with the cloud occasioned by the deed to the grantee. *Garrett v. Wagner*, 125 Mo. 450 (28 S. W. Rep. 762). A purchaser at an execution sale of land takes only the interest of the judgment debtor at the time the judgment became a lien on the land, and a deed or mortgage then unrecorded is to be preferred as against the title of a purchaser at the execution sale, at least if it be recorded before the sale. *Hargraves v. Menken*, 45 Neb. 668 (68 N. W. Rep. 951). Under Hill's Wash. Code, Vol. II, § 519, the purchaser has the right to the possession or rents of the property from the date of sale until redemption. *Byers v. Rothschild*, 11 Wash. St. 296 (89 Pac. Rep. 688); *Hardy v. Herriott*, 11 Wash. St. 460 (89 Pac. Rep. 958). Mere clerical errors in the judgment cannot affect the title. *Hogue v. Corbit*, 156 Ill. 540

(41 N. E. Rep. 219; 47 Am. St. Rep. 232). The title of one claiming under an execution sale made on a judgment in attachment proceedings cannot be collaterally attacked on account of amendable defects in the original affidavit which would render the proceedings merely voidable. Such a sale is not affected by failure of the officer to state in his levy that the property belonged to the defendant, nor his failure to return the writ until after the return day. *Hogue v. Corbit*, 156 Ill. 540 (41 N. E. Rep. 219; 47 Am. St. Rep. 232). The constitutionality of Ind. Rev. Stat., 1894, § 2669, which provides that on a judicial sale of a husband's land the wife's inchoate third interest shall vest in her, cannot be attacked by the judgment creditors of the husband who have purchased his land at a price sufficient to satisfy their judgments, although the statute was passed after the accrual of their debts but before the judicial sale. *Currier v. Elliott*, 141 Ind. 394 (39 N. E. Rep. 554; 50 Am. St. Rep. 337). See opinion for extensive consideration of this statute. Where a stranger purchases at an execution sale without notice or knowledge of any irregularities of the officer in the execution of his writ he has a right to presume that the acts of the officer under the writ prior to the sale were in compliance with the law; but where the purchase is by the judgment plaintiff, the judgment debtor may, in a direct action, question the validity of the levy. *Herr v. Broadwell*, 5 Colo. App. 467 (39 Pac. Rep. 70).

A purchaser of land at an execution sale with notice of a resulting trust therein in favor of a third person takes subject to such trust. *Miller v. Baker*, 166 Pa. 414 (31 Atl. Rep. 121; 45 Am. St. Rep. 680). Where the attorney of the plaintiff becomes the purchaser at an execution sale he is chargeable with notice of all preceding irregularities. *Harness v. Cravens*, 126 Mo. 233 (28 S. W. Rep. 971). Where land is sold pending an application to have it set apart as a homestead a purchaser with notice takes the fee, subject to the homestead estate, which may afterwards be set apart. *Crine v. Johns*, 96 Ga. 220 (22 S. E. Rep. 913). Where property of the judgment debtor, the record title of which is in his name, is subject to a trust created in good faith in favor of his wife, which he has openly admitted for many years, and of which the purchaser was notified at the time of the sale, such

purchaser takes the land subject to the trust. *Lewis v. Taylor*, 96 Ky. 556 (29 S. W. Rep. 444).

Sec. 302. Setting aside execution sales. An execution sale of the individual property of a partner cannot be set aside on a collateral attack on account of the fact that there was partnership property out of which the debt could have been realized. *Diamond v. Turner*, 11 Wash. St. 189 (39 Pac. Rep. 379). An execution sale of property which has been previously appraised and set aside to the debtor as a homestead will be set aside. *Caldwell v. Taylor*, Ky. (32 S. W. Rep. 678). The fact that a judgment creditor who purchases at his sale and credits the amount of his judgment with his bid offers to give an additional credit on such judgment on account of another person offering to buy the land at an advance, if it should be resold, which proposition of the judgment creditor is accepted by the court, does not furnish ground for setting aside the sale, though the other person offers a still greater sum. *Hollister v. Vanderlin*, 165 Pa. 248 (30 Atl. Rep. 1002). A judgment debtor having knowledge of all the facts will not be heard in equity in an action to set aside an execution sale of his property in which he has acquiesced by entering into an agreement with the purchaser, as a settlement of litigation between them, that such purchaser may have a writ of possession at a certain time. *Pate v. Hinson*, 104 Ala. 599 (16 So. Rep. 527).

Sec. 303. Sale under a dormant judgment. A sale on an execution issued upon a dormant judgment is merely voidable, and neither such sale nor the title acquired thereunder can be assailed in a purely collateral proceeding. *Gillispie v. Switzer*, 43 Neb. 772 (62 N. W. Rep. 228). The court say: "In *Hinds v. Scott*, 11 Pa. St. 19 (51 Am. Dec. 506), this question was discussed in the following language: 'As between debtor and creditor, the land of the former is as accessible to the latter, in payment of his debt, as would be a horse or any other personal chattel; and a complaint that either species of property was applied in discharge of an unrevived judgment is entitled to equal favor. The question, in this aspect of it, has nothing to do with the lien of the judgment. It is simply a question whether the property of a

debtor is liable to be sold in satisfaction of an execution issued against him. It would be strange, indeed, if, in Pennsylvania, such a debtor, seised of real estate, could hold his creditor at arm's length until he had revived his judgment under the act of 1798. True, there ought regularly to be a *sci. fa. post annum et diem*; but this is equally necessary where the object is the seizure of personalty. It is objected that there is none such here. Had this objection been made by the defendant in proper time, the execution against him must have been set aside. But it is an irregularity insufficient to avoid the sheriff's sale, and therefore cannot be taken advantage of in this collateral proceeding. Indeed, it lies only in the mouth of the defendant himself to take exception in proper time, for he may choose to, and frequently does, waive the writ of *sci. fa.* It is intended for his personal protection. Should he suffer his land to be sold by execution without it, neither he nor those claiming under him can afterwards be permitted to call in question the validity of the sale; more especially this cannot be done, as is here attempted, in a collateral action of ejectment. *Vastine v. Fury*, 2 Serg. & R. 426; *Bailey v. Wagoner*, 17 Serg. & R. 827; *Speer v. Sample*, 4 Watts, 875.' In *Yeager v. Wright*, 112 Ind. 280 (13 N. E. Rep. 707), it was said that 'the validity of a judgment is not impaired because, by the expiration of ten years, it has ceased to be a lien upon the real estate. This was practically, as well as correctly, settled by the case of *Martin v. Prather*, 82 Ind. 535. The doctrine that an execution issued on a dormant judgment, without a revival or leave of court, is not void but only voidable, as against direct proceedings to have it set aside or annulled, was also reaffirmed in that case. On that subject, see, also, the cases of *Mavity v. Eastridge*, 67 Ind. 211, and *Richey v. Merritt*, 108 Ind. 847 (9 N. E. Rep. 886).' This question was fully considered in *Eddy v. Coldwell*, 23 Or. 163 (31 Pac. Rep. 475; 37 Am. St. Rep. 672), with the same result reached in the cases above cited. In *Gerecke v. Campbell*, 24 Neb. 306 (38 N. W. Rep. 847), there was presented but one question, and that was the right of a debtor to recover back a payment which he had made upon a dormant judgment. The language used by Jacob Cobb in illustrating the views of this court is so apposite to our present subject of

inquiry that it may profitably be reproduced. He said: 'Section 29 of Herman on executions (an authority cited by counsel for defendant in error) is devoted to the discussion of the validity of executions on dormant judgments. I quote from the text: "The consequences of issuing an execution after a year and a day are the same as the consequences of a premature issue. The writ is voidable, but not void. The defendant may take proceedings to have it set aside. If he interposes no objection to the irregularity, others cannot do so for him. Even he cannot attack it collaterally, and a levy and sale made under it are sufficient to transfer his title." To this the author cites twenty-nine American and English cases. Most of these I have examined, and found to fully sustain the text.' "

Sec. 304. Miscellaneous notes. An execution for a fine may be levied out of real estate. *Gill v. State*, 89 W. Va. 479 (20 S. E. Rep. 568, 45 Am. St. Rep. 928). Citing *Leake v. Furguson*, 2 Grat. 434; Freem. Ex'ns, § 172; *Jones v. Jones*, 1 Blands. Ch. 443 (18 Am. Dec. 827); *Rex v. Woolf*, 1 Chit. 401; 18 E. C. L. 225, 229, 230; *Kane v. People*, 8 Wend. 203; 1 Bish. Cr. Proc. § 1804. The court's approval of a sale on execution will not cure the defect of a judgment wanting in jurisdiction. *Willamette Real Estate Co. v. Hendrix*, 28 Ore. 485 (42 Pac. Rep. 514). The right of a judgment creditor of a decedent to enforce his judgment by execution sale, given by Minn. Gen. Stat., 1894, § 5447, applies only to real estate upon which he had acquired a lien before the debtor's death. *Byrnes v. Sexton*, 62 Minn. 143 (64 N. W. Rep. 155). Criticising *Bower v. Holladay*, 18 Ore. 491 (22 Pac. Rep. 558). Where the description in the return, order of sale, advertisement and deed is not sufficient to designate the land, or to notify the owner and public of the sale of the land, the sale is void. *Tatum v. Croom*, 60 Ark. 487 (30 S. W. Rep. 885). Citing, Freem. Ex'ns, § 281; *Shoemaker v. McMonigle*, 86 Ind. 422; *Pfeiffer v. Lindsay*, 66 Tex. 123 (1 S. W. Rep. 265). One who has several judgments against a debtor may, if he sees fit, enforce all of them; but if any particular property of a judgment debtor is legally sold under a valid execution, the entire interest of the judgment debtor therein is divested, and a subsequent sale of the same property

under other executions conveys nothing. *Finch v. Turner*, 21 Colo. 287 (40 Pac. Rep. 565). One who purchases land from a judgment debtor which has been previously sold on execution against him acquires only the rights of the debtor therein. *Finch v. Turner*, 21 Colo. 287 (40 Pac. Rep. 565). S. C. Rev. Stat., §§ 746, 2561, applied—sheriff's fees for selling land. *Williams v. McLendon*, 44 S. C. 174 (21 S. E. Rep. 616).

EXECUTORS AND ADMINISTRATORS.

EPITOME OF CASES.

Sec. 305. Powers of executors and administrators. Executors have no power to purchase real estate unless such power is granted by will. They cannot, whether acting separately or jointly, create an original liability on the part of the estate or enter into an executory contract binding upon or enforceable against it. *Wilson v. Manson*, 158 Ill. 804 (49 Am. St. Rep. 162; 42 N. E. Rep. 134). A representative of an estate has power to compromise an action prosecuted or defended in good faith by him, so far as the rights of such estate may be affected in the action if prosecuted to judgment without being authorized to do so by the probate court. *Dunbar, C. J., and Scott, J., dissenting. Denney v. Parker*, 10 Wash. St. 218 (38 Pac. Rep. 1018). A probate court may authorize an administratrix to mortgage land belonging to the estate to secure the payment of money borrowed to liquidate the debts of such estate. *Pershing v. Wolfe*, 6 Colo. App. 410 (40 Pac. Rep. 856). Where it appears that a mortgage given by an executrix is to secure the repayment of funds of which the estate received the benefit it will be enforced against it, although the note given therefor is not signed by such executrix as such. *Roarty v. McDermott*, 146 N. Y. 296 (41 N. E. Rep. 80). A full and unrestricted power to sell given by a will to the executor therein named is not personal, but passes to an administrator of the estate, with the will annexed, who

is appointed, on account of the resignation of the executor. *Green v. Russell*, 108 Mich. 688 (61 N. W. Rep. 885). Where a will has been duly probated at the domicile of the testator a sale and conveyance by his executors of land in another state, under a power in the will, made before the probating of the will in such other state, is valid, and a subsequent probate of the will in such state relates back and perfects the sale. *Babcock v. Collins*, 60 Minn. 78 (61 N. W. Rep. 1020; 51 Am. St. Rep. 508). In a well-considered case it is held that where a husband and wife are appointed joint executors with power of sale of realty, and the husband is disqualified by reason of being a subscribing witness to the will, the wife may execute the power of sale alone by a deed in which her husband joins. *Lippincott v. Wikoff*, N. J. Eq. (88 Atl. Rep. 805).

Sec. 306. Rights as to possession and rents of decedent's realty. An executor with power to sell real estate is not entitled to the possession thereof as against a residuary legatee, unless his possession is taken for the purpose of selling, and such legatee is entitled to rents collected after the testator's death. *In re Watt's Estate*, 168 Pa. 431 (82 Atl. Rep. 25). The right of action for the use and occupation of land survives to the personal representatives, and not to the devisees of a testator. *Swart v. Reveal*, Ky. (29 S. W. Rep. 24). In Indiana an administrator has no control over the real estate except in case it becomes necessary to pay debts, in which event he can proceed to sell it only by order of court. The heirs, and not the creditors, are entitled to the rents, and this is so even after a petition to sell the real estate has been filed. The administrator, even if he collect such rents, cannot apply them to the payment of debts, unless he is acting under the special order of the court in renting the property. *First Nat. Bank v. Hanna*, 12 Ind. App. 240 (89 N. E. Rep. 1054).

Sec. 307. Sale to pay debts. Resort cannot be had to the real estate of a deceased debtor until the personal property has been exhausted. *Macgill v. Hyatt*, 80 Md. 258 (30 Atl. Rep. 710). Where the necessity for selling land to pay the debts of the testator has been established by the proper judicial proceedings, it is entirely proper for the parties interested in the estate to furnish the money for the payment of

the debts, and to take deeds for the land in severalty. *Sager v. Mead*, 171 Pa. 349 (33 Atl. Rep. 355). Where an annuity is charged upon land, and the trustees having no personal estate advance money to pay the same, land may be sold by the court to repay such advances as well as annuities. *Kreemer v. Fidelity Trust & Safety-Vault Co.*, Ky. (29 S. W. Rep. 684). After the sale has been confirmed and a deed executed to the purchaser, parties to the proceedings for sale cannot attack the sale on account of irregularities. *Dooly v. Russell*, 10 Wash. St. 195 (38 Pac. Rep. 1000). The doctrine of *caveat emptor* applies to an administrator's sale to pay debts; and a purchaser at such a sale which is subsequently declared invalid is not entitled to subrogation to the rights of creditors whose claims his money has paid. *Borders v. Hodges*, 154 Ill. 498 (39 N. E. Rep. 597).

Sec. 308. Sale to pay debts—Practice. Land cannot be sold to pay the debts of a decedent until a petition has been filed for that purpose, and notice given to the heirs. *Picard v. Montross*, Miss. (17 So. Rep. 375). The right of creditors to institute proceedings to sell lands to pay debts, provided for by Miss. Code, 1880, § 2047, does not exist where the estate is insolvent. *Maynard v. Cocke*, Miss. (18 So. Rep. 374). Where it is necessary to sell land of a decedent to pay debts, and also in order to divide the same, both forms of relief may be obtained in one suit, the statutory requirements governing each being complied with. *Rodgers v. Rodgers' Adm'r*, Ky. (31 S. W. Rep. 189). An order, under N. C. Rev. Code, ch. 46, § 44, granting an administrator license to sell land "if, in the settlement of the estate, it would be found necessary," is not void as being a conditional judgment, or as an attempt to vest in the administrator judicial power. *Sledge v. Elliott*, 116 N. C. 712 (21 S. E. Rep. 797). Where, upon petition by an administrator to sell lands to pay debts, under N. C. Rev. Code, ch. 46, § 44, a court grants such administrator license to sell all lands described and fixes the terms of the sale, a subsequent order, without setting out the terms of sale, granting the administrator "leave to dispose of" one of the tracts described in the original order, will relate back to such order for terms of sale.

Sledge v. Elliott, 116 N. C. 712 (21 S. E. Rep. 797). Parties to proceedings to sell land are bound by a decree therein. *Cobb v. Garner*, 105 Ala. 467 (17 So. Rep. 47). Where land ordered sold to pay debts is subject to a mortgage, the holder of which is made a party to a decree ordering the sale of the land free from the mortgage and its payment out of the proceeds, a sale thereunder binds him, extinguishes his lien on the land and transfers it to the proceeds. *Hall v. Price*, 141 Ind. 576 (40 N. E. Rep. 1084). After thirty years, a recital in the decree, of service upon all parties to the action, some of whom were minors, will be presumed true as against a collateral attack. *Sledge v. Elliott*, 116 N. C. 712 (21 S. E. Rep. 797). The regularity of the appointment of an administrator cannot be assailed for the first time in a proceeding brought by him to sell land to pay debts. *Waldow v. Beemer*, 45 Neb. 626 (63 N. W. Rep. 918). A delay of three years one month and eleven days after the appointment of an administratrix was held not to bar an action to sell land to pay debts, the statute prescribing no limit for such proceeding. *Reed v. Reed*, Ia. (68 N. W. Rep. 829). Persons who are not parties and who have made no effort to be made parties cannot object for the first time on the hearing of a motion to confirm the sale. *Marcom v. Wyatt*, 117 N. C. 129 (23 S. E. Rep. 169). The sale of land by an administrator made in pursuance of an order of a court having jurisdiction is not void and cannot be collaterally attacked on account of errors in the procedure. *Simpson v. Bailey*, 80 Md. 421 (30 Atl. Rep. 622). Where it appears that the administrator has no funds with which to pay debts a sale for that purpose will not be invalidated on account of his petition exaggerating the amount of indebtedness. *Simonin's Heirs v. Czarnowski*, 47 La. 1334 (17 So. Rep. 847). Where a sale is decreed by a proper court it will be presumed that such court satisfied itself by evidence of the necessity for the sale, and made its decree accordingly; and the fact that the administrator's account as allowed showed a balance in his hands does not raise the presumption that the subsequent sale of land by him was not necessary to pay the decedent's debts. *Jacocks v. Paterson*, 18 R. I. 751 (30 Atl. Rep. 795). A purchaser at an administrator's sale is not entitled to an order for possession when the

defendants were not in possession of the land when the order of sale was made, nor were they claiming possession through any person who was in possession at the commencement of the proceedings. *Marcom v. Wyatt*, 117 N. C. 129 (28 S. E. Rep. 169). If a purchaser of succession property at a succession sale pays a portion of the price to meet privileged claims, receives a deed in which it is declared that he retains the balance in his own hands, secured by special mortgage and vendor's privilege in favor of the succession, conditioned to meet all claims which might be adjudged prior to his own, and subsequently an account is filed and regularly homologated, in which he is recognized as a creditor for the retained balance, the adjudication to him cannot be treated as an absolute nullity on a claim that he was not a creditor of the succession, or a creditor to the amount he asserted himself to be. *Simonin's Heirs v. Czarnowski*, 47 La. 1334 (17 So. Rep. 847). Ala. Code, § 2111, applied—sufficiency of proof as to the necessity of selling real estate. *Garner v. Toney*, 107 Ala. 852 (18 So. Rep. 161). Cal. Code. Civ. Proc., § 1587, construed and applied—validity of decree—presumptions. *Burris v. Kennedy*, 108 Cal. 881 (41 Pac. Rep. 458); overruling *Burris v. Kennedy*, Cal. (38 Pac. Rep. 971). Wash. Code Proc., §§ 1006, 1007, applied—order of sale—publication. *Furth v. United States M. & T. Co.*, 13 Wash. 78 (42 Pac. Rep. 528).

Sec. 309. Validity of sales—Setting aside. An administrator's sale of lands when the owner is alive although admitted to be dead by his children, under a misapprehension of the facts, is void. *Springer v. Shavender*, 116 N. C. 12 (21 S. E. Rep. 397; 47 Am. St. Rep. 791). A sale by an administrator under a power in a will will be set aside where it appears to have been unnecessary and made at a sacrifice, and without notice to devisees. *Littell v. Gouge*, Ky. (32 S. W. Rep. 411). Where a will directs a sale of land by two executors, a sale is not rendered invalid where only one of them was present at the public auction, the other consenting to his acts, and subsequently ratifying and approving it. *Dunn's Ex'rs v. Renick*, 40 W. Va. 349 (22 S. E. Rep. 66). The court say: "Now, it may be, likely is, true that if one

executor had acted throughout alone in the sale, without approval, his act would be void as an act under the will, which conferred a mere naked power, and that joint. *Johnson v. Thompson*, 5 Cal. 248; *Deneale v. Morgan*, Id. 407; 1 Lomax Dig. 362; 2 Pow. Dev. 294; *Brown v. Hobson*, 8 A. K. Marshall 380 (18 Am. Dec. 187); *Floyd v. Johnson*, Id. 255. It can hardly be that a sale would be set aside merely because both were not at the auction; so he concurred in the act by ratification."

A purchaser at an executor's sale cannot have the sale set aside because the executor bid upon the property, such bidding being done in good faith. *Riggs v. Schweitzer*, 170 Pa. 549 (33 Atl. Rep. 116). An executor's deed cannot be set aside for the reason that it was without consideration, after a long lapse of time. *Babcock v. Collins*, 60 Minn. 78 (61 N. W. Rep. 1020; 51 Am. St. Rep. 503). A sale to pay debts cannot be set aside by a party thereto, for fraud, where such party continues to hold the benefit derived by her therefrom. *Sager v. Mead*, 171 Pa. 849 (33 Atl. Rep. 355). Where the order of sale recited, the court "heard, understood, and fully considered the law and the premises," the sale will not be set aside in a collateral attack by a grantee of a distributee in the final decree based upon the validity of such sale, for the reason that the original petition did not allege the value of the property sought to be sold as required by the statutes. *Burris v. Kennedy*, Cal. (38 Pac. Rep. 971). For opinion reversing this case on rehearing see, *Burris v. Kennedy*, 108 Cal. 546 (41 Pac. Rep. 458). Ky. Civ. Code, § 891 applied—right of minor heirs to set aside sale. *Back v. Combs*, 96 Ky. 522 (29 S. W. Rep. 852).

Sec. 310. Purchase by executor or administrator at his own sale. In the recent case of *Axton v. Carter*, 141 Ind. 672 (39 N. E. Rep. 546), the supreme court of Indiana say: "It is a well-established proposition that a sale of real estate made by an executor or administrator to himself through a third party is voidable at the election of *cestui que trust*, but not void. *Comegys v. Emerick*, 134 Ind. 148 (33 N. E. Rep. 889; 39 Am. St. Rep. 245); *Carter v. Lee*, 51 Ind. 292; *Rice v. Cleghorn*, 21 Ind. 89; *Morgan v. Wattles*, 69 Ind. 260;

Shaw v. Swift, 1 Ind. 565; *Murphy v. Teter*, 56 Ind. 545; *Dodge v. Stevens*, 94 N. Y. 209; 1 Perry, Trusts, § 195, p. 246; 2 Perry, Trusts, § 602w; 1 Bigelow, Frauds, pp. 820, 822, 842, 843. It has been uniformly held that if one having the right to avoid a sale of land receives the proceeds of the sale, or any part thereof, with a full knowledge of all the facts, he thereby confirms and ratifies the sale, and cannot afterwards avoid it. *Wilmore v. Stetler*, 137 Ind. 127 (34 N. E. Rep. 857; 86 N. E. Rep. 856; 45 Am. St. Rep. 169); *Walling v. Burgess*, 122 Ind. 299 (22 N. E. Rep. 419; 23 N. E. Rep. 1076; 7 L. R. A. 481); *Palmerton v. Hoop*, 131 Ind. 29 (30 N. E. Rep. 874), and authorities cited; *State v. Stanley*, 14 Ind. 409; 2 Herm. Estop. §§ 1057, 1059, 1063, 1069. This rule applies to sales made by an administrator to himself through the intervention of a third party. *Scott v. Freeland*, 7 Smedes & M. 409 (45 Am. Dec. 810); *Jones v. Smith*, 33 Miss. 215; *Bruch v. Lantz*, 2 Rawle, 417-420 (21 Am. Dec. 458); *Beeson v. Beeson*, 9 Barr, 299, 300; 2 Pom. Eq. Jur., §§ 964, 965, 1078; 1 White & T. Lead. Cas. Eq. 256-258; 1 Bigelow, Frauds, 820-822." A statute (How. Mich. Stat., § 6042) which renders void a purchase at his own sale by a guardian or executor does not extend to a subsequent *bona fide* purchase by him from one who himself purchased in good faith at such sale. *Otis v. Kennedy*, Mich. (65 N. W. Rep. 219). Citing, *Wayland v. Crank*, 79 Va. 602; *Welch v. McGrath*, 59 Iowa, 519 (10 N. W. Rep. 810; 13 N. W. Rep. 638); *Staples v. Staples*, 24 Grat. 225; *Silverthorn v. McKinster*, 12 Pa. St. 67; *Crevelling v. Fritts*, 34 N. J. Eq. 134. Utah Comp. Laws, § 4196, which provides that "no executor * * * must directly or indirectly, purchase any property of the estate he represents, nor must he be interested in any sale," is held not to apply to the purchase by an executor of an heir's interest in the estate. *Haight v. Pearson*, 11 Utah 51 (39 Pac. Rep. 479).

Sec. 311. Miscellaneous notes. An administrator *de bonis non* is bound by adjudications made against his predecessor. *Hunter v. Shelby Iron Co.*, Ala. (18 So. Rep. 107). Ga. Code, §§ 2448, 2564, which provides that an executor or administrator "cannot sell property held adversely to the estate by a third person," does not invalidate a convey-

ance of land so held, made by the executor, under a special power given by the will, to one of the heirs of his estate, in the way of paying to such heir his interest in the estate. *French v. Baker*, 95 Ga. 715 (22 S. E. Rep. 652). Alabama Code, 1876, § 2614, provides that "no suit must be commenced against an executor or administrator, as such, until six months and no judgment rendered against him, as such, until eighteen months after the grant of letters of administration." This statute is held not to apply to a case in which the defendant's decedent during his life time held possession of lands to which the plaintiff's intestate claimed title and upon decedent's death the possession was taken by his administrator, on the ground that if the decedent had no title to the land his holding was tortuous and the possession of the administrator was also wrongful and was his individual tort. *Torrey v. Bishop*, 104 Ala. 548 (16 So. Rep. 422).

FENCES.

EPITOME OF CASES.

Sec. 312. Fencing railroads — Statutes construed. Fencing railroads within a city can not be prohibited as a nuisance. *Grossman v. City of Oakland*, Ore. (41 Pac. Rep. 5). A statute (Miss. Code 1892, § 8561), requiring a railroad corporation, whether incorporated before or after the passage of the statute, to construct and maintain "proper stock gaps and cattle guards," is a legitimate exercise of the police power of the state. *Kansas City M. & B. R. Co. v. Spencer*, 72 Miss. 491 (17 So. Rep. 168). Citing, *Thrope v. Railroad Co.*, 27 Vt. 140 (62 Am. Dec. 625); *Railway Co. v. Emmons*, 148 U. S. 864 (13 Sup. Ct. 870); *Gorman v. R. R. Co.*, 26 Mo. 441 (72 Am. Dec. 220); 2 Mor. Priv. Corp., §§ 1067, 1073; *Trow v. R. R. Co.*, 24 Vt. 487 (58 Am. Dec. 191); *Railroad v. Tilton*, 12 Ind. 8 (74 Am. Dec. 195); *Railroad Co. v. Waldron*, 11 Minn. 515 (88 Am. Dec. 100); *Norris v. Railroad Co.*, 89 Me. 273 (63 Am. Dec. 621);

Wilder v. Railroad Co., 65 Me. 332 (20 Am. Rep. 698); *Railroad Co. v. Crider*, 91 Tenn. 489 (19 S. W. Rep. 618); *Grissell v. Railroad Co.*, 54 Conn. 447 (1 Am. St. Rep. 149, note; 9 Atl. Rep. 137), with authorities; and *Brentner v. Railway Co.*, 58 Iowa 625 (7 Am. & Eng. Ry. Cas., note at page 578; 12 N. W. Rep. 615). Where a railroad can not be fenced without obstructing a public highway, the company is neither permitted or required to fence, but if there is sufficient space between the railroad and the highway for the company to fence in its railroad, it must do so if otherwise proper, even if it be compelled to locate the fence on part of its right of way. *Lake Erie & W. R. Co. v. Rooker*, 18 Ind. App. 600 (41 N. E. Rep. 470). A receiver operating a railroad company cannot avoid compliance with an order of court requiring him to construct a farm crossing on certain land for the reason that he has no funds at his disposal with which to construct it. *Peckham v. Dutchess Co.*, 145 N. Y. 885 (40 N. E. Rep. 15). Grounds exempt from fencing under the statute requiring a railroad to fence its track, on account of their being "depot grounds," have been defined to be "the place where passengers get on and off trains, and where goods are loaded and unloaded, and all grounds necessary and convenient and actually used for such purpose by the public and by the railroad company. This includes the switching and making up of trains, and the use of side tracks for the storing of cars, and the place where the public require open and free access to the road for the purpose of such business." *Grosse v. Chicago & N. W. Ry. Co.*, 91 Wis. 482 (65 N. W. Rep. 185). A railroad company can not excuse itself from complying with a statute (Ill. Act, Mar. 31, 1874) requiring it to fence its track by showing that the road can be more safely and conveniently used if unfenced at a given point. *Toledo, St. L. & K. C. R. Co. v. Franklin*, 159 Ill. 99 (42 N. E. Rep. 319). Ind. Rev. Stat. 1894, § 5324, applied—construction of fence by landowner—action to recover cost. *Chicago & S. E. Ry. Co. v. Woodard*, 18 Ind. App. 296 (41 N. E. Rep. 544). Under a statute (Ia. Acts, 1888, ch. 80) regulating the character of fence which railroads must construct, and providing that "when said railroad corporations, who now have their fences built shall, when they rebuild or repair their fences the

same shall be built as provided in this act," it is held that in order for the statute to apply to "repairs" they must consist in "a virtual rebuilding of a portion of the fence, requiring new posts to be put in, and the repairs to be of such a general character as to involve and include the structure and height of the fence." *Moeckley v. Chicago & N. W. Ry. Co.* Ia.

(61 N. W. Rep. 227). Me. Rev. Stat., ch. 51, § 86, requiring railroads to fence their right of way where the road passes through "enclosed or improved land," held to apply to a particular case. *Osborne v. Canadian Pac. Ry. Co.*, 87 Me. 808 (32 Atl. Rep. 902). In construing Minn. Gen. Stat. 1894, § 2692 (Gen. Stat. 1878, ch. 84, § 54), requiring railroad companies to build good substantial fences "on each side of such roads," it is held that the quoted words mean the margin or border of the entire grounds or right of way, and that it is the duty of railroad companies, when fencing their tracts, to place a fence on such margin or border, but their failure to do so does not deprive the land owner adjoining the right of way to connect his other fences with the railroad fence so as to enclose his land. *Gould v. Great Northern Ry. Co.*, Minn. (65 N. W. Rep. 125). In construing Miss. Code, 1892, § 8561, which requires railroad corporations to construct and maintain "proper stock gaps and cattle guards," and provides a penalty for their failure to do so, it is held that a "cattle guard," within the meaning of this statute, is a guard or protection extending the whole width of the right of way, unless the land owner waives his right to this by agreeing to join his fences up to the edge of the track; that the penalty prescribed by the statute may be recovered as often as the company continues to fail to perform its duty, and actual damages resulting from such failure may be recovered with the penalty in the same suit. *Kansas City, M. & B. R. Co. v. Spencer*, 72 Miss. 491 (17 So. Rep. 168).

Sec. 313. Miscellaneous notes. One who is guilty of negligence in the construction of his portion of a partition fence, as required by statute, is liable for injury to the stock of an adjoining owner resulting therefrom. *Lowe v. Guard*, 11 Ind. App. 472 (39 N. E. Rep. 428). Ind. Rev. Stat. 1894, §§ 6564, 6565, construed and applied—action against township

trustee for failure to repair—sufficiency of complaint. *State v. Kemp*, 141 Ind. 125 (40 N. E. Rep. 661). Mass. Stat. 1887, chap. 848, provides that any fence unnecessarily exceeding six feet in height maliciously erected or maintained to annoy the owner or occupants of adjoining property shall be deemed a private nuisance and give such owners or occupants an action of tort for damages sustained thereby. Construing and applying this statute it was held not to apply to a fence constructed on the opposite side of a highway even though the parties own the fee in the highway. *Spaulding v. Smith*, 162 Mass. 548 (89 N. E. Rep. 189).

FIXTURES.

EPITOME OF CASES.

Sec. 814. As to what constitutes a fixture. Chattels must, to constitute them fixtures, be actually annexed to the real estate, or something appurtenant thereto. They need not necessarily be attached to the building. That is one way of annexing them to the soil, but not the only way. To satisfy this test, it is not material whether the substructure is brick or wood, or whether the machinery is annexed to the building or rests upon a foundation securely laid for it in the soil, and to which it is fastened. The fact that the chattels in controversy may be removed and sold for other uses, or that they were not made for special adaptation to the buildings in which they are placed, is not decisive of their character. Those qualities are mere circumstances to be considered. There must be actual annexation with an intention to make a permanent accession to the freehold, but it is not necessary that there be an intention to make the annexation perpetual. The intention must exist to incorporate the chattels with the real estate for the uses to which the real estate is appropriated, and there must be the presence of such facts and circumstances as do not lead to, but repel, the inference that it is intended to be a temporary annexation. *Feeder v. Van*

Winkle, 58 N. J. Eq. 870 (88 Atl. Rep. 899; 51 Am. St. Rep. 628). In Vermont it is held that actual annexation to the freehold, and adaptation to its purposes, it is not sufficient to convert chattels into fixtures, unless they are fastened in such a manner as to show an intention to incorporate them firmly with the inheritance; and that if articles of machinery used in a factory for manufacturing purposes are only attached to the buildings to keep them steady and in their place, so that their use as chattels, may be more beneficial, and are attached in such a way that they can be removed without any essential injury to the freehold or to the articles themselves, they still remain personal property. *Kendall v. Hathaway*, 67 Vt. 122 (80 Atl. Rep. 859).

Sec. 815. Landlord and tenant—Removal of fixtures. If a tenant remove the fixtures of a building and replace them with fixtures better suited to his business and more expensive, he does not thereby become entitled to remove the latter upon the termination of the lease. *Felcher v. McMillan*, 108 Mich. 494 (61 N. W. Rep. 791). Under the Cal. Civ. Code, §1019, it is held that a one-story wooden building, 20 feet square, having for a foundation mud sills laid on the surface of the ground on which are placed short posts which support the main sills, built and used by the tenant on leased premises for a lumber yard office, is a trade fixture which may be removed by the tenant during his term. *Macdonough v. Starbird*, 105 Cal. 15 (88 Pac. Rep. 510). When a new contract is entered into between the landlord and his tenant, which neither renews nor extends the former lease, but which creates a new lease, and in which the right to the fixtures annexed during the first lease is not reserved, the tenant loses his privilege of removal. *Wright v. Macdonell*, 88 Tex. 140 (80 S. W. Rep. 907). Citing, *Loughran v. Ross*, 45 N. Y. 792 (6 Am. Rep. 178); *Carlin v. Ritter*, 68 Md. 478 (13 Atl. Rep. 870; 16 Atl. Rep. 801; 6 Am. St. Rep. 467), and authorities there cited. Structures which would otherwise be fixtures, erected under a contract giving the tenant the right to remove them, are the personal property of the tenant which he has a right to remove within a reasonable time. *Wright v. Macdonell*, 88 Tex. 140 (80 S. W. Rep. 907). Property which a

tenant has a right to remove as trade fixtures must be removed within a reasonable time after the expiration of the lease. *Sheller v. Shivers*, 171 Pa. 568 (83 Atl. Rep. 95). Buildings erected for the purpose of a livery stable under an express permission given in the lease were held removable as trade fixtures. *Firth v. Rowe*, 58 N. J. Eq. 1064 (32 Atl. Rep. 1064). For particular fact case giving various phases of the rights of tenants in regard to fixtures, see *Wright v. Macdonell*, 88 Tex. 140 (30 S. W. Rep. 907).

Sec. 316. Manure—Removal of by tenant. A farm tenant is entitled to remove manure resulting from feed grown elsewhere and bought by him, and he does not lose this right by intermingling such manure with other manure, of the same quality and value, without fraudulent or wrongful intent, but has a right to take his proportion thereof. *Pickering v. Moore*, N. H. (32 Atl. Rep. 828; 81 L. R. A. 698). The court say: "Manure made upon a farm by the consumption of its products in the ordinary course of husbandry is a part of the realty. It cannot be sold or carried away by the tenant without the landlord's consent. *Sawyer v. Twiss*, 26 N. H. 345, 349; *Perry v. Carr*, 44 N. H. 118, 120; *Hill v. De Rochemont*, 48 N. H. 87, 88. The doctrine was established for the benefit of agriculture. It found its origin in the fact that it is essential to the successful cultivation of a farm that the manure produced from the droppings of cattle and swine fed upon the products of the farm, and composed with earth and vegetable matter taken from the land, should be used to supply the drain made upon the soil in the production of crops, which otherwise would become impoverished and barren, and in the fact that the manure so produced is generally regarded by farmers in this country as a part of the realty, and has been so treated by landlords and tenants from time immemorial. *Haslem v. Lockwood*, 37 Conn. 500, 505 (9 Am. Rep. 350). Whether a tenant, 'where there is no positive agreement dispensing with the engagement to cultivate his farm in a husband-like manner, is bound to spend the hay and other like produce upon it as the means of preserving and continuing its capacity,' *Perry v. Carr*, 44 N. H. 118, 120, and *Hill v. De Rochemont*, 48 N. H. 87, 88, in other words, whether the

express or implied obligation to cultivate the farm in a husband-like manner binds him, as matter of law, to convert into manure all the fodder grown on the premises, is a different and possibly an open question, *Wing v. Gray*, 86 Vt. 261, 266, 267; *Lewis v. Lyman*, 22 Pick. 437, 444, 445; *Middlebrook v. Corwin*, 15 Wend. 169, and cases cited; *Brown v. Crump*, 1 Marsh. C. P. 567; *Legh v. Hewitt*, 4 East 154, 159; *Moulton v. Robinson*, 27 N. H. 550, 561; Cooley, Torts, 834, 843, 844. However that may be, no rule of good husbandry requires a tenant to buy hay or other fodder for consumption on the farm. If, in addition to the stock maintainable from its products, he keeps cattle for hire, and feeds them upon fodder procured by purchase, or raised by him on other lands, the landlord has no more legal or equitable interest in the manure so produced than he has in the fodder before it is consumed. It is not made in the ordinary course of husbandry. It is produced 'in a manner substantially like making it in a livery stable.' *Hill v. DeRochemont*, 48 N. H. 87, 90; *Corey v. Bishop*, 48 N. H. 146, 148. It is immaterial whether the additional stock is kept for hire or is the tenant's property. *Needham v. Allison*, 24 N. H. 855.

The plaintiff did not lose his property in the manure by intermixing it with the defendant's manure, of the same quality and value, without his consent. It is not claimed that the plaintiff mixed the manure with any fraudulent or wrongful intent. 'The intentional and innocent intermixture of property of substantially the same quality and value does not change the ownership. And no one has a right to take the whole; but, in so doing, commits a trespass on the other owner. He should notify him to make a division, or take his own proportion at his peril, taking care to leave to the other owner as much as belonged to him.' *Ryder v. Hathaway*, 21 Pick. 298, 306; *Gilman v. Hill*, 36 N. H. 811, 823; *Robinson v. Holt*, 39 N. H. 557, 563 (75 Am. Dec. 233); *Moore v. Bowman*, 47 N. H. 494, 501, 502; *Railroad Co. v. Foster*, 51 N. H. 400, 493. 'Even if the commingling were malicious or fraudulent, a rule of law which would take from the wrongdoer the whole, when to restore to the other his proportion would do him full justice, would be a rule not in harmony with the general rules of civil remedy, not only because it would

award to one party a redress beyond his loss, but because it would compel the other party to pay—not damages, but a penalty.’ Cooley, Torts, 53, 54.” See Ballards’ Annual, Vol. 1, § 111, p. 164.

Sec. 317. Mortgagor and mortgagee — Machinery. Erections or additions put upon mortgaged real estate subsequently to the execution of the mortgage, under such circumstances as to stamp them with the character of fixtures thereon, as between the mortgagor and mortgagee and persons with notice, become subject to the lien of the mortgage. In establishing whether a given thing is or is not a fixture upon land, the intention of the owner in placing it there, to be gathered from his declarations, and from the character, relations and purposes of the property, is an important element, sometimes of controlling importance. *Seedhouse v. Broward*, 34 Fla. 509 (16 So. Rep. 425). In ascertaining whether a machine becomes a part of the realty in favor of mortgagees, the rule is that the manner, purpose and effect of annexation to the freehold must be regarded. If a building be erected for a definite purpose, or to enhance the value of realty for occupation, whatever is built into it to further those objects becomes a part of it even though there be no permanent fastening such as would cause permanent injury if removed. *Wade v. Donau Brewing Co.*, 10 Wash. St. 284 (38 Pac. Rep. 1009). As between the mortgagor and mortgagee, it is held that gas fixtures consisting of chandeliers and burners, screwed to the ends of gas pipes projecting from the walls and ceilings of the building, are not part of the realty, but that steam radiators attached at the floor to steam pipes, and an electric annunciator attached to the wall, and to all the wires of the electric bell system of the hotel, and the office desk, twenty-five feet long which rested on the tile floor and partially formed the hotel office, constituted a part of the realty. *Capehart v. Foster*, 61 Minn. 128 (63 N. W. Rep. 257).

Sec. 318. Vendor and vendee—Machinery. Where the advertisement of real estate for sale at public auction describes the property as to be sold “with the buildings and improvements thereon, and all rights, ways, privileges, and appurtenances thereto belonging, or in any wise appertaining,”

the purchaser of the property under the advertisement acquires the ownership of all of the movables made immovable by destination forming part of the property at the time of the sale, although in a subsequent portion of the advertisement the property is referred to as "equipped with water connections with the Mississippi river, together with boilers, filters, and pumps, which will be sold with the property, thereby securing free water." It is the duty of the seller to express himself clearly, and any obscure or ambiguous clause is construed against him. A mere intention to dismantle a building in which machinery had become a part and immobilized by destination, remaining unexecuted up to the time that third persons acquired the property in its actual existing condition, produces no effect as against such third person. *Maginnis v. Union Oil Co.*, 47 La. 1489 (18 So. Rep. 459). A grantee who has innocently purchased a building in which machinery has been placed in such a manner as to become a part of the realty is not in any way affected by the agreement between his vendor and the seller of the machinery to the effect that the latter should retain title until the machinery was paid for. *Wentworth v. S. A. Woods Mach. Co.*, 168 Mass. 28 (89 N. E. Rep. 414). It is held that machines fastened to the floor and connected with the shafting in a building which are constructed after fixed patterns and bought and sold in gross and which may be used for the purposes for which they were intended in one building as well as another, are not fixtures. *Chase v. Tacoma Box Co.*, 11 Wash. St. 877 (39 Pac. Rep. 689). Machines placed in a building by one who is a mere licensee for mining purposes do not become fixtures so as to be subject to a mechanic's lien on the land. *Springfield Foundry & Machine Co. v. Cole*, 180 Mo. 1 (81 S. W. Rep. 922).

FORCIBLE ENTRY AND DETAINER.

EPITOME OF CASES.

Sec. 319. As to when the action may be maintained. The action cannot be maintained against one who has acquired peaceable possession by merely proving a previous constructive possession. *O'Donohue v. Holmes*, 107 Ala. 489 (18 So. Rep. 263). An executor may maintain the action against a tenant of his decedent. Cal. Code, Civ. Proc., § 1582, applied. *Knowles v. Murphy*, 107 Cal. 107 (40 Pac. Rep. 111). As to what constitutes forcible entry, see case with annotations, 2 Ballards' Annual, §§ 260-264.

Sec. 320. Practice—Statutes construed. Title is not involved in an action of unlawful detainer brought before a justice of the peace to recover possession of land. *Cobb v. Garner*, Ala. (17 So. Rep. 47). Where the giving of the required notice is alleged it is not necessary to aver the manner of service. *Knowles v. Murphy*, 107 Cal. 107 (40 Pac. Rep. 111). A description of the property in controversy given in a complaint as "Lot 1, block 12, Gates' Second addition to Mount Vernon," the same being copied from the lease, was held sufficient although it is not stated where the addition was located, it appearing that possession was taken under the lease. *Squires v. Zumwalt*, 12 Wash. St. 241 (40 Pac. Rep. 986). A judgment rendered by a justice of the peace in favor of a plaintiff in an action for forcible detainer against his tenant is not void because the complaint shows on its face that the lease has not terminated. *Clayton v. Hurt*, 88 Tex. 595 (82 S. W. Rep. 876). Where the action is by a landlord against his tenant it is no defense for the tenant to allege that he has attorned to the purchaser of the property at a foreclosure sale under a mortgage executed by his landlord. *Pugh v. Davis*, 108 Ala. 816 (18 So. Rep. 8; 49 Am. St. Rep. 80).

In construing Cal. Civ. Code, § 1942, in which a tenant may make necessary repairs, not to exceed one month's rent, or vacate the premises, in case the landlord refuses to make such repairs, it is held that a tenant, upon such refusal by his landlord, who remains in possession without making such repairs, cannot defend in an action for forcible detainer for non-payment of rent on account of his landlord's failure to repair. *Moroney v. Hellings*, 110 Cal. 219 (42 Pac. Rep. 560). Cal. Code Civ. Proc., §§ 1159, 1160, 1172, applied—sufficiency of findings. *Adams v. Helbing*, 107 Cal. 298 (40 Pac. Rep. 422). Under Ill. Rev. Stat. 1893, ch. 57, § 2, cl. 4, a demand for possession, before bringing an action of forcible detainer against a tenant holding over, is not necessary. *Condon v. Brockway*, 157 Ill. 90 (41 N. E. Rep. 634). Mass. Pub. Stat., ch. 175, § 1, applied—summary proceedings to recover possession of land. *Marster v. Cling*, 163 Mass. 477 (40 N. E. Rep. 763). How. Mich. Stat., Vol. 3, §§ 8295, 8296, applied—sufficiency of complaint. *Gage v. Sanborn*, Mich. (64 N. W. Rep. 82). Minn. Gen. Stat. 1894, § 6118, applied—sufficiency of answer. *Lloyd v. Secord*, 61 Minn. 448 (68 N. W. Rep. 1099). Neb. Code Civ. Proc., § 1023, applied—sufficiency of proof. *Blackford v. Frenzer*, 44 Neb. 829 (62 N. W. Rep. 1101). Hill's Wash. Code, Vol. 2, § 564, applied—right to double damages. *Gaffney v. Megrath*, 11 Wash. St. 456 (39 Pac. Rep. 973).

FRAUDULENT CONVEYANCES.

EPITOME OF CASES.

Sec. 321. As to what is a fraudulent conveyance. Where a conveyance is made to a party wholly and primarily for the use of the grantor, it is void as to his creditors, existing or subsequent, without reference to the intention of the parties thereto, for as to creditors of the grantor the subject-matter of the grant remains his property; but where the conveyance is made for the actual and real use of the grantee, and the reservation of a benefit to the grantor is incidental and

partial, it is not void as to creditors, unless in fact it was made with the intention to defraud them. *Wetherill v. Canney*, 62 Minn. 841 (64 N. W. Rep. 818). A board of directors of an insolvent corporation cannot, by mortgage upon the corporate property, secure one of the directors the payment of an antecedent debt due by the company to such director, or a previous liability incurred by such director for the corporation. A mortgage was made by a solvent company to one of its directors, under an arrangement that such mortgage should be kept from the record for the purpose of strengthening the credit of the company, while the directors should test the success of the corporate business at the risk of future creditors, and the mortgage was not recorded until the corporation became insolvent. Held, that such mortgage was fraudulent. *Montgomery v. Phillips*, 53 N. J. Eq. 208 (31 Atl. Rep. 622). For cases which depend upon particular facts and illustrate what is a fraudulent conveyance, see *Michigan Trust Co. v. Bennett*, Mich. (64 N. W. Rep. 880); *Hecht v. Eherke*, Ia. (64 N. W. Rep. 650); *R. P. Gustin Co. v. Arn*, Mich. (65 N. W. Rep. 112); *Shepherd v. First Nat. Bank*, 16 Mont. 24 (40 Pac. Rep. 67); *Austin v. Harbin*, 95 Tenn. 598 (32 S. W. Rep. 628); *Burgroff v. Bagby*, Ky. (32 S. W. Rep. 940); *Kerstner v. Vorweg*, 130 Mo. 196 (32 S. W. Rep. 298); *Thomson v. Cohen*, 127 Mo. 215 (28 S. W. Rep. 984); Reversing 24 S. W. Rep. 1028.

Sec. 322. Devises to avoid creditors of the devisee. It is held that a provision in a will to the effect that the land "shall in no wise ever be subject to any debt, liability, execution, attachment, or judgment against" the devisee, is void. *Van Osdell v. Champion*, 89 Wis. 661 (62 N. W. Rep. 589; 46 Am. St. Rep. 864; 27 L. R. A. 773). The court say: "It is laid down as a general rule that 'a condition, annexed to a conveyance in fee or by devise, that the purchaser or devisee should not alienate, is unlawful and void. If the grant be upon the condition that the grantee shall not commit waste, or not take the profits or his wife have her dower, or the husband his curtesy, the condition is repugnant and void, for these rights are inseparable from the estate in fee. Condi-

tions are not sustained when they are repugnant to the estate granted, or infringe upon the essential enjoyment of the independent rights of property, and tend manifestly to public inconvenience.' Kent Comm. *181; 2 Redf. Wills, 287, 290. 'But it has been held that land may be conveyed to a married woman so as to exclude her husband upon her death from becoming tenant of the premises by the curtesy.' *Haight v. Hall*, 74 Wis. 152 (42 N. W. Rep. 109; 17 Am. St. Rep. 122; 8 L. R. A. 857).

The authorities are very generally agreed that property cannot be conveyed, devised, or bequeathed with a restriction against it, or any portion of it, going to assignees in bankruptcy or in any form to creditors, although a grant may be made which shall be determinable by way of cesser, or by limitation of the estate over to another upon the occurrence of a certain event; such as insolvency, bankruptcy, or the occurrence of any other act or event arising or growing out of the conduct or neglect of the grantee or devisee. The bounty of a grantor or testator may, however, be secured to another by means of a trust—a 'spendthrift's,' as it is sometimes called; so that the periodical income of the estate cannot be anticipated by the *cestui que trust*, but may be paid to him from time to time, beyond the power of creditors to intercept or reach it. Many such cases are collated and cited by appellants' counsel, some of which are referred to in *Nichols v. Eaton*, 91 U. S. 717, 727; and the whole subject is fully considered in *Bank v. Adams*, 138 Mass. 170, and *Foster v. Foster*, Id. 179. But these cases are all clearly distinguished from the present, by reason of the absolute and unlimited condition contained in the residuary clause of Mrs. Champion's will, under which her son, Charles B. Champion, obtained his title. We have not been referred to, nor are we aware of any authority that would warrant us in upholding, as against the creditors of Charles B. Champion, the provision by which the devise to him was upon the express condition that the premises should 'in no wise ever be subject to any debt, liability, execution or attachment against him, existing at this time or at any time hereafter.' The condition is general and is not limited to future events. It was intended to affect existing as well as future writs or judgments. and is unlimited in point

of time, and was manifestly an attempt to secure the estate in hands of a devisee in fee against the claims of creditors incident to such an ownership by the laws of every civilized state; and to sustain such a condition would be productive of great inconvenience to creditors and those dealing with the grantee or devisee upon the faith of apparent absolute ownership, and would be contrary to sound public policy. To give effect to such a condition would be, as to such transaction, to permit parties to abrogate and annul the law of the state by a mere private arrangement; and the contention of the appellants' counsel goes to the extent of claiming that a man may thus be the full legal, as well as equitable, owner of property thus devised, deal with it as he pleases, and that it shall not be liable for his debts. This would be to destroy, in a very great degree, all faith in the apparent ownership of property, and countenance secret exceptions from liability of a debtor's property for his debts, and would tend to mischievous and fraudulent results. In *Bank v. Davis*, 21 Pick. 41, it was held that a provision, in a devise of land, that the land should not 'be subject or liable to conveyance or attachment,' was void because contrary to law, which makes a man's property liable for the payment of his debts. In that case, as in this, the condition was unlimited in point of time; and it was declared to be 'an attempt to impose a restraint upon property which the law would not allow.' In *Bramhall v. Ferris*, 14 N. Y. 44 (67 Am. Dec. 113), while sustaining the provision there in question, it was said that 'any attempt to make the interest of the beneficiary inalienable, or to withdraw it from the claims of creditors, would have been nugatory, * * * would clearly be repugnant to the estate in fact devised and bequeathed, and would be ineffectual for that reason as well as upon the policy of the law.' This view is sustained in *Hahn v. Hutchinson*, 159 Pa. St. 138, 138-141 (28 Atl. Rep. 167); *Stansbury v. Hubner*, 73 Md. 228 (20 Atl. Rep. 904; 11 L. R. A. 204; 25 Am. St. Rep. 584); *Steib v. Whitehead*, 111 Ill. 251; *Harvesting Mach. Co. v. Gates*, 75 Ia. 343 (39 N. W. Rep. 657); *Ehrisman v. Sener*, 162 Pa. St. 577 (29 Atl. Rep. 719). We hold, therefore, that the provision in the will of Mrs. Champion, relied on to protect the property

devised to Charles B. Champion from the claims of his judgment creditors, is void."

Sec. 323. Conveyances to near relatives. Where a conveyance from a failing debtor to a creditor who is a near relative is made upon an adequate consideration and in good faith, it will not be set aside as fraudulent to creditors. *Feldman v. Nicolai*, 28 Ore. 84 (40 Pac. Rep. 1010). A conveyance by a debtor to his grandson in consideration of the payment of an annuity, whereby his creditors were deprived of the means of enforcing the payment of their debts, is invalid as to them, irrespective of the bad faith of the grantee, but the latter may be protected to the extent of payments which he has made in good faith. *Walker v. Cady*, Mich. (68 N. W. Rep. 1005). Where property is conveyed from one relative to another as a payment for an alleged past-due indebtedness, and thereby creditors of the party making the conveyance are deprived of their just dues and claims, the transaction will be scrutinized or examined very closely, and its *bona fides* will be clearly established. *Steinkraus v. Korth*, 44 Neb. 777 (62 N. W. Rep. 1110).

Sec. 324. Deeds between husband and wife. A conveyance of land by a husband to his wife in payment of a debt created in good faith will not be set aside as fraudulent, although it may have the cause of delaying or hindering his other creditors. *Gaar, Scott & Co. v. Klein*, Ia. (61 N. W. Rep. 918). A wife who is a *bona fide* creditor of her husband may be preferred by him the same as any other creditor. *Stramann v. Scheeren*, 7 Colo. App. 1 (42 Pac. Rep. 191). As against his creditors, a husband has a right to pay for land and have it conveyed to his wife in discharge of a *bona fide* debt which he owes her. *Jones v. Cannon*, 8 Hous. (Del.) 1 (81 Atl. Rep. 521). In contests between the husband's creditors and the wife, transactions between her and her husband should be closely scrutinized. *Sommermeier v. Sommermeier*, 89 Wis. 66 (61 N. W. Rep. 811); *McTeers v. Perkins*, 106 Ala. 411 (17 So. Rep. 547). The relation of debtor and creditor in a legal sense, as between husband and wife, must be shown in order to sustain a transaction between them as against the husband's creditors. *Letz v. Smith*,

Ia. (62 N. W. Rep. 745). In a recent case the supreme court of Connecticut say: "Where a transaction in which a husband and wife are engaged, and in which it is claimed that the wife is colluding with her husband to conceal his property in her hands, so as thereby to defraud his creditors, is the subject of inquiry, it should be examined with all reasonable diligence, to discover if such fraud exists. The community of interest between husband and wife is such, the opportunities for frauds of this kind between them are so convenient, the temptations are so great, and the instances in which embarrassed husbands have resorted to this kind of proceeding for the purpose of withdrawing their property from the reach of their creditors and preserving it in their own hands are so frequent, that all such transactions should be subjected to a rigorous scrutiny. But if, upon the whole case, the wife shows by the evidence, to the satisfaction of the trier, that, as between her husband and herself, the consideration was her own money, instead of his, we think she should have judgment in her favor." *Throckmorton v. Chapman*, 65 Conn. 441 (82 Atl. Rep. 980). Where the consideration of a deed of an insolvent husband to his wife consists of the nominal sum of one dollar, love and affection and the conveyance of a portion of her separate estate, which of itself is solely inadequate, the conveyance will be set aside except as to the value of such separate estate of the wife. *Hull v. Wm. Deering & Co.*, 80 Md. 424 (81 Atl. Rep. 416). A wife's joining in a deed conveying to her husband's creditors his incumbered real estate is not a sufficient consideration to support the deed from him to her conveying other property, it not appearing that the real estate conveyed to the creditors was worth more than its incumbrances. *Commonwealth T. Ins. & T. Co. v. Brown*, 166 Pa. St. 477 (81 Atl. Rep. 205). In an action to set aside a fraudulent conveyance made by the husband to the wife where it is shown that she has paid valid incumbrances, the decree should provide for her reimbursement and its enforcement by lien upon the premises. *Costello v. Prospect Brewing Co.*, 52 N. J. L. 557 (80 Atl. Rep. 682). A judgment creditor of community property may have the conveyance made by the community to the wife set aside, it appearing that his execution has been returned unsat-

isfied, there being no proof that there is sufficient other property belonging to the community to satisfy his claim. *Klosterman v. Harrington*, 11 Wash. St. 188 (89 Pac. Rep. 876). For cases which depend upon particular facts and illustrate the rights of creditors against conveyances between husband and wife, see *Wanser v. Lucas*, 44 Neb. 759 (62 N. W. Rep. 1108); *Tyler v. Budd*, Ia. (64 N. W. Rep. 679); *Phoenix F. & M. Ins. Co. v. Shoemaker*, 95 Tenn. 72 (81 S. W. Rep. 270).

Sec. 825. Innocent purchase by wife—Fraud of husband—Agent's knowledge imputed to principal. It is held that where a husband who is insolvent fraudulent conveys his land to a third person without consideration and then procures such third person to convey the same to his wife without consideration but in payment of a valid debt due to her from the husband, such conveyance may be set aside for fraud on the ground that in procuring the conveyance to the wife the husband acted as her agent and she became chargeable with his fraud. *Trumbull v. Hewitt*, 65 Conn. 60 (81 Atl. Rep. 492). The court say: "Assuming then, that she was a purchaser for a valuable consideration, was she also an innocent purchaser—a purchaser in good faith—within the meaning of the rule invoked in her favor? We think not. The court below has, indeed, found that, in all this scheme on the part of Mr. Hewitt to defraud his creditors, his wife was his ignorant and passive instrument, possessed of no actual knowledge of his insolvency or of his intended fraud and having no intention herself to perpetrate a fraud. The finding is sufficient to show that she is guiltless of the fraud of her husband in a moral sense; but, if he acted as her agent to a certain extent in this matter, then in a legal sense, and for civil purposes, the case is quite different. In that case, and in so far as he was her agent, or acted as her agent, his objects and purposes became hers, his knowledge hers, and to a limited extent his frauds became her frauds. Thus in *Warren v. Warren*, 46 N. Y. 228, the knowledge and fraudulent purpose of the husband as agent of the morally innocent wife were held to be legally her knowledge and her fraudulent purpose. In *Smith v. Board*, 88 Conn. 208, it is said that: 'Principals are always pre-

sumed to have knowledge of all the acts done or declarations made by or to their agents, when acting in relation to the subject-matter of the agency, and within the scope of an actual or apparent authority conferred upon them. In *First Nat. Bank of New Milford v. Town of New Milford*, 86 Conn. 101, the knowledge of the fraud possessed by the agent of the bank was held to be the knowledge of the bank; in *Willard v. Buckingham*, 86 Conn. 895, the knowledge of the general agent of those having charge of the railroad was held to be their knowledge; in *O'Connell v. Kilpatrick*, 64 Md. 122 (21 Atl. Rep. 98), it was held that the agent's knowledge of the seller's intent to defraud creditors was the knowledge of his principal, who purchased without actual knowledge of such intent; and in *Clark v. Fuller*, 89 Conn. 288, the knowledge of the fraud possessed by the husband as agent of the innocent wife was held to be her knowledge of the grantor's intent to defraud his creditors. Nor does it make any difference in the application of this principle that the agent and grantor are one and the same person. Thus in *Marjoribanks v. Hovenden*, 6 Ired. Eq. 288, an attorney at law, the owner of a certain interest in land, mortgaged it to secure a debt. The mortgage was not duly registered, and the attorney, some eighteen months after the execution of the first mortgage, mortgaged the same property to another person who had no knowledge of the existence of the first mortgage. The second mortgage was duly registered, but the second mortgagee had employed the mortgagor as his attorney in the transaction; and it was held that the knowledge of the attorney of the existence of the first mortgage was legally the knowledge of his principal, the second mortgagee. The court said in that case: 'The question arose in *Sheldon v. Cox*, Amb. 624, whether there was any distinction where the agent was also the owner of the property, and it was held that there was no distinction in such a case. The question in every case is, not whether the agent had any interest, but whether he had any notice of the incumbrance; and it is quite clear that, if a man employs a solicitor who is also the owner of the property, he is as much bound by the knowledge of that solicitor as if he had employed one who had no interest whatever in it. *Atkins v. Delmege*, 12 Ired. Eq. 1, is to the same effect. In

all that Mr. Hewitt did in the matter, after he delivered the deeds of his interest in these lands to Ford and Hooper, he was acting, not as grantor, but as agent for his wife; as such he requested Ford and Hooper to convey the interest they had thus acquired in the lands to her; as such he received the deeds from them; and as such he put them upon record. It is true that the aforesaid acts were, when done, done without her knowledge or consent; but she subsequently fully ratified them by accepting and retaining the benefit of them. 'An act done for another by a person not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal, if subsequently ratified by him. * * * In that case the principal is bound by the act, whether it be for the detriment or advantage, and whether it be in tort or contract.' *Wilson v. Tuman*, 6 Man. & G. 236. In such cases an express ratification is not necessary. As a general rule, 'if the principal receives and retains the proceeds of the agent's fraud—the property, money, and the like obtained through an executed transaction—or claims the benefit of, or attempts to enforce, an executory obligation thus procured, he renders himself liable for the fraudulent acts of his agent.' 2 Pom. Eq. Jur. (1st Ed.), § 909; *First Nat. Bank of New Milford v. Town of New Milford*, *supra*. The agent of Mrs. Hewitt, then, at the time these conveyances were made to her, and while acting for her, had full and complete knowledge of the insolvency of Mr. Hewitt, and of his intent to defraud his creditors, and her agent actually aided and assisted Mr. Hewitt in the accomplishment of his fraudulent designs. It is only assuming that Mrs. Hewitt was a mere automaton in respect to such designs that she can be excused morally from the guilt of participation therein. Legally she cannot be excused."

Sec. 326. Husband obtaining credit on, or doing business with, the wife's capital. Where a wife knowingly permits her real estate to appear of record in the name of her husband and he obtains credit upon faith of such apparent ownership, as between the creditors and the wife she will be estopped to assert title in an action by such creditors to subject the land to the payment of their claims. *Pierce v.*

Hower, 142 Ind. 626 (42 N. E. Rep. 223); *Warner v. Watson*, 85 Fla. 402 (17 So. Rep. 654). Where land which has been bought with the wife's money, through her ignorance is conveyed to the husband, who when pressed by his creditors causes it to be reconveyed to the wife, as against her, such conveyance will not be set aside, but she will be permitted to retain the title on the ground that it was purchased with her money. *Beck v. Shultz*, N. J. Eq. (82 Atl. Rep. 695); *De Berry v. Wheeler*, 128 Mo. 84 (80 S. W. Rep. 888). A husband may engage in business with his wife's capital, in her name and on her credit, for her benefit; but if, owing to his skill and labor, large profits accrue therefrom over and above the necessary expenses and indebtedness of the business, including the support of himself, wife, and family, a court of equity will justly apportion such profits between his wife and his existing creditors. *Boggess v. Richards' Adm'r*, 89 W. Va. 567 (20 S. E. Rep. 599; 45 Am. St. Rep. 988). Citing, Bump on fraudulent conveyances. *Shackleford v. Collier*, 6 Bush. 150; *Murphin v. Taylor*, 16 Ohio St. 509; *Penn v. Whitehead*, 17 Grat. 527 (94 Am. Dec. 478); *Trapnell v. Conklyn*, 87 W. Va. 242 (16 S. E. Rep. 570; 88 Am. St. Rep. 80).

Sec. 827. Conveyances in fraud of dower. In the recent case of *Stroup v. Stroup*, 140 Ind. 179 (89 N. E. Rep. 864; 27 L. R. A. 523), the supreme court of Indiana say: "Conveyances in anticipation of marriage and intended to defeat dower are void. *Dearmond v. Dearmond*, 10 Ind. 191; *Swaine v. Perine*, 5 Johns., Ch. 482; *Kelly v. McGrath*, 70 Ala. 75; *Petty v. Petty*, 4 B. Mon 219 (39 Am. Dec. 501); *Jones v. Jones*, 64 Wis. 801 (25 N. W. Rep. 218); *Lake v. Nolan*, 81 Mich. 112 (45 N. W. Rep. 876); *Youngs v. Carter*, 10 Hun. 194; 14 Cent. Law J. 102; Boone, Real Prop., § 56; Tied. Real Prop., § 126. * * * While the authorities are in conflict the weight of authority is certainly in support of the conclusion that where the husband, intending to defeat the claim of his wife to dower, secures a conveyance of lands purchased by him to be made but colorably to another, and securing to himself the full use, control and disposition of the property, such conveyance is fraudulent as against the wife, and

she may, before or after his death, recover that part of the lands which, under the law, would have fallen to her in case the conveyance had been to her husband, instead of by the colorable device which held the actual seizin from him. *McGee v. McGee*, 4 Ired. 105; *Dunnock v. Dunnock*, 8 Md. Ch. 140; *Hays v. Henry*, 1 Md. Ch. 887; *Creelius v. Horst*, 4 Mo. App. 419; *Buzick v. Buzick*, 44 Iowa 259 (24 Am. Rep. 740); *Thayer v. Thayer*, 14 Vt. 107 (39 Am. Dec. 211); *Sanborn v. Lang*, 41 Md. 107; *Gilson v. Hutchinson*, 120 Mass. 29; *Rabbitt v. Gaither*, 67 Md. 94 (8 Atl. Rep. 744); *Tucker v. Tucker*, 29 Mo. 850; *Stone v. Stone*, 18 Mo. 889; *Jenny v. Jenny*, 24 Vt. 824." Subject to certain limitations and as against any post mortem claim of his widow, a married man in Illinois and Kansas, may, during coverture, give away to his children absolutely the bulk of his property when the known effect of the gift will be to deprive the widow of the fair share of the property which would otherwise have fallen to her. *Small v. Small*, 58 Kan. 1 (42 Pac. Rep. 828). A conveyance by a husband to his children by a former marriage, of a small portion of his estate, he retaining that which would, in the ordinary course of events, be ample provision for himself, wife and family, is not a fraud upon her marital rights. *Walker v. Walker*, 66 N. H. 890 (81 Atl. Rep. 14; 49 Am. St. Rep. 616; 27 L. R. A. 799).

Sec. 328. Badges of fraud. In Illinois it is held that the mere omission to record a mortgage is not as to subsequent creditors or purchasers fraudulent. *Haas v. Sternbach*, 156 Ill. 44 (41 N. E. Rep. 51). The fact that a conveyance of land belonging to a corporation is taken in the name of one of its officers who subsequently mortgages the land for funds which are used by the corporation, there being no denial of the trust, does not render such a conveyance fraudulent as to creditors and stockholders of the corporation. *Donham v. Hahn*, 127 Mo. 439 (30 S. W. Rep. 184). A deed by an insolvent debtor to secure a preceding debt due an estate executed to the administrator thereof, who is also a distributee, accompanied by a secret agreement that the grantee will return to the grantor whatever share of the indebtedness he receives from the estate, is fraudulent as against the other creditors of the

grantor. *Roberts v. Barnes*, 127 Mo. 405 (80 S. W. Rep. 118; 48 Am. St. Rep. 640).

Sec. 329. Voluntary conveyances. In a recent case the supreme court of Mississippi say: "All the authorities agree in holding that a voluntary conveyance is presumptively void as to existing creditors, and the burden of proof is on the party making the conveyance to support it. The authorities are equally unanimous that a voluntary conveyance can be set aside by subsequent creditors if made with the intent to defraud them; the only difference being that, as to the subsequent creditors, the burden of proof is on them to show that the conveyance was made for the purpose of defrauding them. The result is the same in either case, and the question is one of the burden of proof. While it is true that it has been held that a man who is not in debt can convey all his property to his wife, and the conveyance be upheld as against subsequent creditors, although they may give credit upon the faith of the particular property, it will be found that the causes which support this proposition depend upon the particular facts of each case." *Wynne v. Mason*, 72 Miss. 424 (18 So. Rep. 422). A voluntary conveyance is presumptively fraudulent as to an existing creditor and as to such of his claim as accrues after the conveyance. *Trezevant v. Terrell*, Tenn. (88 S. W. Rep. 109). A contract of marriage to be solemnized is a valuable consideration and will uphold a deed. *Bumgardner v. Harris*, 92 Va. 188 (28 S. E. Rep. 229). A gift from a husband to his wife is presumptively fraudulent as to existing creditors. *McTeers v. Perkins*, 106 Ala. 411 (17 So. Rep. 547); *Hoffman v. Nolte*, 127 Mo. 120 (29 S. W. Rep. 1006). A gross inadequacy of price may raise the presumption that the conveyance is fraudulent. *Case Mfg. Co. v. Perkins*, Mich. (64 N. W. Rep. 201). Where there is no valuable consideration for a deed, one of the material questions is the intent of the grantor, and it is immaterial how innocent the grantees are. They are bound by his acts, and, if he was heavily indebted at the time of making the conveyance, the inference is that the instrument was fraudulently made for the purpose of hindering and delaying his creditors. A voluntary conveyance of land, made by a debtor

while he is under embarrassed circumstances, is conclusively fraudulent, and will be held void, as to existing creditors, without proof of actual fraud. And this is so although the grantee has no knowledge of a fraudulent intent on the part of the grantor. *Ogden State Bank v. Barker*, 12 Utah 18 (40 Pac. Rep. 765); *Moore v. Jeffries*, Miss. (18 So. Rep. 272). A conveyance of property worth \$6,500 for a consideration of \$400 is voluntary. *Wynne v. Mason*, 72 Miss. 424 (18 So. Rep. 422).

Sec. 330. Conveyance in fraud of creditors void — Rights of subsequent creditors. In a recent case the supreme court of Alabama say: "A fraudulent conveyance is totally void, except as between the grantor and grantee. It is the same as if it had never been made. It may be set aside, either at law or in equity, and this upon the principle that, except as to the grantee, the fraud so vitiates it that the title does not pass. As to all who deal with the grantor, either as creditors or purchasers, the title is in the grantor, and the property subject in the same way as if this title was not clouded by the conveyance. If the creditor's demand was contracted without notice of the fraud, it would seem, upon clear principles, he should not be precluded from subjecting the property, upon subsequent discovery of the fraud. If he actually knew of the fraudulent character of the conveyance, he thereby knew of its utter invalidity, and the liability of the property to the payment of all debts of the grantor, existing or subsequent. He knew that the property was held in trust by the donee for any and all creditors of the grantor, and the donee would not, therefore, be heard to say that the debt of the subsequent creditor was not created in reliance upon the property." *Echols v. Peurrung*, 107 Ala. 660 (18 So. Rep. 250). Taking a new note to secure a pre-existing debt does not render one a subsequent creditor so as to prevent his having a conveyance set aside as fraudulent. *Trezevant v. Terrell*, Tenn. (88 S. W. Rep. 109).

Sec. 331. Preference of creditors. A conveyance in preference of a creditor made by one in contemplation of insolvency or who is actually insolvent, the creditor having reasonable cause to believe that his grantor contemplates insol-

vency or is insolvent, will be held fraudulent. *Whipple v. Bond*, 164 Mass. 182 (41 N. E. Rep. 203). It is held that a preference of a creditor with a fraudulent intent to delay other creditors will not be set aside unless the preferred creditor in some way participates in the fraud. *Ogden State Bank v. Barker*, 12 Utah 27 (40 Pac. Rep. 769). It is held that while an insolvent debtor may, by a *bona fide* mortgage, which is intended merely as a security, prefer one creditor, yet if such mortgage is really designed, not as a security merely, but as a means of transferring his property to one or more of his creditors in preference to others, such a transaction, though not in form an assignment, comes within the mischief intended to be suppressed by the assignment law, and is therefore void. The same rule applies where the debtor, instead of a single mortgage, gives a series of mortgages, or enters into a series of transactions, for a similar purpose. Such transactions will be regarded as violative of the spirit of the assignment law, and therefore void. *Leake v. Anderson*, 48 S. C. 448 (21 S. E. Rep. 439). In Illinois, when a debtor does not make a general assignment under the statute he may prefer one creditor over another. *Dueber Watch-Case Mfg. Co. v. Young*, 155 Ill. 226 (40 N. E. Rep. 582). The North Carolina statute, Act 1898, ch. 458, does not prohibit *bona fide* mortgages to secure one or more pre-existing debts, but when a mortgage is made of the whole of a large estate for a pre-existing debt, omitting only an insignificant remnant of property, such mortgage is, in effect, an assignment for the benefit of creditors secured therein and is invalid unless the assignor file within the time prescribed a verified schedule of the debts preferred. *National Bank of Greensboro v. Gilmer*, 117 N. C. 416 (23 S. E. Rep. 333). The North Carolina statute, Act March 18, 1895, § 1, is as follows: "That all conditional sales, assignments, mortgages, or debts in trust, which are executed to secure any debt, obligation, note or bond, which gives preference to any creditor of the maker, shall be absolutely void as to existing creditors." Construing and applying this statute it is held that it applies only to such conveyances as are made to secure pre-existing debts and does not apply to a case where the debt grows out of the transaction itself and is for a present consideration.

Farthing v. Carrington, 116 N. C. 815 (22 S. E. Rep. 9). Ohio Rev. Stat., §§ 6343 and 6344 in reference to preference of creditors and notice construed and applied. *Pendery v. Allen*, 53 O. St. 251 (41 N. E. Rep. 255). A judgment confessed by an insolvent debtor, together with the execution issued thereon, is, in effect, an assignment of the debtor's property to the extent of the lien or levy of such execution, is void as a preference under § 2, ch. 74, of the W. Va. Code, and inures to the benefit of all the insolvent's creditors. *Mack v. Prince*, 40 W. Va. 824 (21 S. E. Rep. 1012). Under W. Va. Code, 1891, ch. 74, § 2, an insolvent debtor cannot prefer his creditor or creditors by a deed of trust formally executed upon his real estate subsequent to the passage of said act, but the same shall be taken and held to be made for the benefit of all the creditors of such debtor. In interpreting a statute, it should be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous or insignificant, and in construing a proviso or exception contained in the statute, the same rule should be applied. *Argand Ref. Co. v. Quinn*, 39 W. Va. 535 (20 S. E. Rep. 576).

Sec. 332. Effect on the parties—As to when they are bound. A conveyance made for the purpose of defrauding creditors is binding upon the parties and those claiming under them. *Moore v. Horsley*, 156 Ill. 36 (40 N. E. Rep. 823); *Pass v. Lynch*, 117 N. C. 453 (28 S. E. Rep. 357). Such a conveyance cannot be the basis of the vendor's lien. *Glover v. Walker*, 107 Ala. 540 (18 So. Rep. 251). A resulting trust does not arise where the grantee of a fraudulent conveyance claims, under the conveyance, against the grantor. The conveyance may be void as to creditors, but it is valid between the parties, and there can be no resulting trust in favor of one, against his grantee, under a valid, absolute conveyance of his entire interest. *Heinz v. White*, 105 Ala. 670 (17 So. Rep. 185). The heirs of such grantor cannot assert a trust. *Sell v. West*, 125 Mo. 621 (28 S. W. Rep. 969; 46 Am. St. Rep. 508). As a general rule as to executed contracts, if the parties be in *pari delicto*, they will be left where they have placed themselves, but if one party is but an instrument in the hands of another the rule is otherwise. If the mind of one

of the participants in the transaction exercises an undue influence over that of the other, whether by imposition or threats upon the one side and confidence or weakness upon the other, equity will grant relief to the latter. Even if the party had sufficient capacity to contract, yet if through trusting confidence, the other has led him into the illegal act, and then imposed upon him, such relief will not be refused. *Rozell v. Vanickle*, 11 Wash. St. 79 (89 Pac. Rep. 270.)

Sec. 333. Fraud of heirs against creditors of decedent—Parties to fraud without relief. Where the widow and heirs of an insolvent decedent enter into a conspiracy to obtain the real estate of the decedent free from the just claims of the creditors and in pursuance thereof one of the parties to the scheme comes into possession of the whole estate, the others are without any remedy. *Milhous v. Sally*, 48 S. C. 318 (21 S. E. Rep. 268; 49 Am. St. Rep. 834). The court say: "It is urged, however, that it would be inequitable to allow those who had bid off the land to retain the same at the expense of the other heirs. That consideration is entitled to no favor, and has never received any at the hands of a court of equity, when urged by those who participated in the fraudulent arrangement by which such an advantage was acquired by the defendants. It does not approve the conduct of any of the parties to the fraudulent arrangement, but simply leaves them in the situation in which they have placed themselves, and will not lend its aid to relieve any of them. As is said by Dunkin, C. J., in *Hamilton v. Hamilton*, 2 Rich. Eq. 355 (46 Am. Dec. 58), such transaction 'can be enforced by none of the parties to it, *even against each other*.' See, to same effect, *Baggott v. Sawyer*, 25 S. C. 405, where it was held that parties to the conspiracy cannot obtain the aid of the court in specifically enforcing their illegal agreement with their co-conspirators. As is said by Lord Mansfield, in *Holman v. Johnson*, 1 Cowp. 341: 'The objection that a contract is immoral or illegal as between plaintiff and defendant sounds, at all times, very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in a general principle of policy, which the defendant has the advantage of, contrary to real justice as between

him and the plaintiff; by accident, if I may say so. The principle of public policy is this: "*Ex dolo malo non oritur actio.*" No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act.' And as is said by Dixon, C. J., in *Clemens v. Clemens*, 28 Wis. 687, at page 654 (9 Am. Rep. 520), after making the above quotation from Lord Mansfield: 'The principle or policy of the law, therefore, is to reject the suit of and reprove the plaintiff for his wrong, not to reward the defendant. The plaintiff must be punished, even though it be at the expense of allowing the defendant, an equally guilty party, to obtain most unjust and unfair advantage for himself. * * * The suit of the party compelled to seek the aid of the courts, in order to obtain the fruits of his own fraud or wrong, must be dismissed, although it may result in unjustly giving to the other equally culpable party the entire benefit of them.' See to the same effect, 1 Pom. Eq. Jur. § 401, where, among other things, that author says: 'Where two or more have entered into a fraudulent scheme for the purpose of obtaining property in which all are to share, and the scheme has been carried out so that all the results of the fraud are in the hands of one of the parties, a court of equity will not interfere on behalf of the others to aid them in obtaining their shares, but will leave the parties in the position where they have placed themselves.' " This doctrine is fully sustained by *Bank of New Hanover v. Adrian*, 116 N. C. 587 (21 S. E. Rep. 792).

Sec. 334. Effect on the parties—Validity of mortgage made to secure a fictitious consideration. Where one conveys land to another for the purpose of defrauding his creditors a mortgage given to secure the fictitious consideration is held enforceable between the parties. *Bradfelt v. Cooke*, 27 Ore. 194 (40 Pac. Rep. 1; 50 Am. St. Rep. 701). The court say: "The rule is well settled that a court will not, in an action between the parties to an illegal contract, lend its aid either to annul it when executed or enforce it when executory. *Willis v. Hoover*, 9 Ore. 418; *Bernard v. Taylor*, 28 Ore. 416 (31 Pac. Rep. 968; 18 L. R. A. 859; 37 Am. St. Rep. 698). But while the decisions are quite uniform in affirming the foregoing rule, there is in irreconcilable con-

flict of judicial opinion in defining an illegal contract, and hence the important question to be considered is whether a conveyance made to hinder, delay, or defraud the grantor's creditors is valid between the parties thereto when there is a consideration to support it. The statute of frauds, so far as it applies to the case at bar, declares that 'every conveyance * * * of any estate or interest in land * * * made with the intent to hinder, delay or defraud creditors * * * as against the persons so hindered, delayed or defrauded shall be void.' Hill's Code, § 8059. While such conveyances are by the statute declared to be void as to the grantor's creditors, they are nevertheless, by the great weight of authority, binding and valid between the parties. *Harris v. Harris*, 28 Grat. 737; *Hess v. Final*, 32 Mich. 515; *Clemens v. Clemens*, 28 Wis. 637 (9 Am. Rep. 520); *Knapp v. Lee*, 8 Pick. 452; *Dyer v. Homer*, 22 Pick. 258; *Harbaugh v. Butner*, 148 Pa. St. 273 (23 Atl. Rep. 988); *Still v. Buzzell*, 60 Vt. 478 (12 Atl. Rep. 209), Bump. Fraud. Conv. (2d. Ed.), 436, 451; Wait, Fraud. Conv., § 895. But in *Nellis v. Clark*, 20 Wend. 24, it is held that a contract void as to creditors is void between the parties to it, and when such contract is executory, it will not be enforced by courts. The force of this authority is much weakened by the dissenting opinion of Nelson, C. J., in which he clearly distinguishes the difference between an illegal contract, in the strict sense of the term, and one fraudulent as it respects creditors; the former kind being altogether void, and the latter void, only as against the person hindered, delayed or defrauded. In the case of *Harvey v. Varney*, 98 Mass. 118, Foster, J., in commenting upon the question under discussion, said: '*Nellis v. Clark*, 20 Wend. 24, was decided in the supreme court of New York in 1838, by Mr. Justice Cowen and Mr. Justice Bronson, and sustains the position which the present defendants maintain. But a dissenting opinion was delivered by the third judge, Chief Justice Nelson, now of the supreme court of the United States, the reasoning and conclusions of which commend themselves to our judgment in preference to the opinion of the majority of that court.' And Steele, J., in *Carpenter v. McClure*, 39 Vt. 9 (91 Am. Dec. 370), also said: 'We are aware that in *Nellis v. Clark* the court, citing the case from

Maine, have made the distinction between executed and subsisting contracts under a statute very similar to ours, and have put their decision substantially upon the grounds which have been so well set forth in the exhaustive and learned argument of the defendant's counsel. With great respect for the able court, the majority of whom concurred in that decision, we are unable to arrive at the same conclusion. So far as we are informed, contracts fraudulent as to creditors have been uniformly treated by our courts as not becoming thereby void between the parties, and such is clearly the spirit of our reported cases. *Gifford v. Ford*, 5 Vt. 582; *Conner v. Carpenter*, 28 Vt. 240; *Boutwell v. McClure*, 30 Vt. 676.' It would be useless to cite further authority upon this subject, for, as was said by Dixon, C. J., in *Clemens v. Clemens*, 28 Wis. 687 (9 Am. Rep. 520): 'It will be found, on examination, that these questions have been and are the subject of the most direct and positive conflict of opinion and decision among the courts of the different states in this Union, and sometimes among the courts of the same state.' Amid such a conflict of authority it should be the duty of the court, when the question is raised for the first time, to adopt that line of decisions which, in its judgment, presents the better reason; and with this object in view we have carefully examined the numerous cases cited by counsel, both for the plaintiff and defendant, in their exhaustive briefs. It is admitted that where it appears from the plaintiff's own case, or by proper plea of the defendant, that the contract which is the subject of the suit is void because illegal, the court will not lend its aid either to enforce on the one hand or give relief on the other: *Buchtel v. Evans*, 21 Ore. 809 (28 Pac. Rep. 67); *Ah Doon v. Smith*, 25 Ore. 89 (34 Pac. Rep. 1093). But there is a marked distinction between contracts which are void *ab initio* and those which are void only as to third parties. *Harris v. Harris*, 23 Grat. 787. A contract which was void when executed cannot be made valid by ratification of the parties. Wait, Fraud. Conv., § 489; *McIntosh v. Lee*, 57 Iowa, 356 (10 N. W. Rep. 895); *Atlee v. Fink*, 75 Mo. 100 (42 Am. Rep. 385). Nor is there any method whereby an illegal contract—one which never had life—can be rendered efficacious. A fraudulent conveyance is not void, but merely voidable at the suit of the creditor, and is therefor capable of

ratification. Bump, Fraud. Conv. 457; Wait, Fraud. Conv., § 482. A contract entered into to defraud creditors is clearly against the policy of the statute of frauds, as well as against the general policy of the law; but it is not illegal, in the strict sense of the term, for the wrong may be condoned by the creditor, and the transaction will thus become purged of the fraud. *Millington v. Hill*, 47 Ark. 301 (1 S. W. Rep. 547). The conveyance being valid between the parties to it, and not illegal in the strict sense of the term, it follows that the defendant should not have been permitted to plead the defense interposed, and there was error in overruling the demurrer."

Sec. 335. Bona fide purchaser. It is held that the vendee must be shown to have had notice of the fraudulent intent of his grantor, and upon this point the burden is upon the party assailing the conveyance. *Houston & T. C. Ry. Co. v. Shirly*, Tex. (31 S. W. Rep. 291). The fraudulent intent of the grantee is a question of fact and not of law. *Austin v. Harbin*, 95 Tenn. 598 (32 S. W. Rep. 628). Even if full value be given for property, and the object, known to the grantee, is to enable the grantor to set his creditors at defiance, the conveyance is void. *Sayre v. Coyne*, N. J. Eq. (33 Atl. Rep. 300). Fraud may as readily be effected

when a full and fair price is paid as when nothing is paid. A person may be resolved not to pay his debts, and another, knowing this, may treat with him, and purchase his whole estate at a fair and full price, and thus enable him to defeat the claims of his creditors. Although the purchaser gains no advantage, he enables the debtor to avoid the payment of his debts, and the effect upon the creditors is precisely the same as if nothing were paid. As it is the intent to withdraw the debtor's property from the reach of his creditors, that generally makes a transfer for full value fraudulent. If the grantee has notice of the debtor's fraudulent intent, the transfer is void without reference to his actual intent. The law in such case charges him with the guilty knowledge which makes him a participator in the fraud. It is not necessary that the grantee shall have actual knowledge of the debtor's intent to delay, hinder, or defraud his creditors in order to render the transfers void. A knowledge of facts sufficient to excite the suspicions

of a prudent man, and to put him on inquiry, or to lead a person of ordinary perception to infer fraud, or the means of knowing by the use of ordinary diligence, amounts to notice, and is equivalent to actual knowledge, in contemplation of law. If the grantor and grantee are relatives or are intimate, this is a fact from which it may be inferred that the latter knows the former's financial condition. *O'Leary v. Duvall*, 10 Wash. St. 666 (39 Pac. Rep. 163).

Sec. 336. Exempted property. The sale and conveyance of a homestead cannot operate as a fraud upon creditors, and the title of the purchaser cannot be affected by the purpose of the grantor in making the sale and conveyance. *Roser v. Fourth Nat. Bank*, 56 Kan. 129 (42 Pac. Rep. 341); *C. Aultman & Co. v. Salinas*, 44 S. C. 299 (22 S. E. Rep. 465). There can be no fraudulent conveyance of property exempt from execution. *Merchants' Nat. Bank v. Kopplin*, 1 Kan. App. 599 (42 Pac. Rep. 263); *Kvello v. Taylor*, N. Dak. (68 N. W. Rep. 889); *Bank of Versailles v. Guthrey*, 127 Mo. 189 (29 S. W. Rep. 1004; 48 Am. St. Rep. 621). A conveyance of property set aside for fraud at the suit of the grantor's creditors does not prevent him or his wife from afterwards claiming a right of homestead in the premises so conveyed. The fraudulent conveyance does not place the creditors in any better position than they occupied before it was made. The homestead still remains exempt. *Kennedy v. First National Bank*, 107 Ala. 170 (18 So. Rep. 396). Citing, *Freem. Ex'ns*, § 138; *Dearman v. Dearman*, 4 Ala. 521; *Vaughan v. Thompson*, 17 Ill. 78; *Muller v. Inderreiden*, 79 Ill. 382; *Lishy v. Perry*, 6 Bush. 515; *Kuevan v. Specker*, 11 Bush. 1; *White v. Givens*, 29 La. 571; *Succession of Cottingham*, Id. 669; *Legro v. Lord*, 10 Me. 161; *Castle v. Palmer*, 6 Allen 401; *Smith v. Rumsey*, 33 Mich. 183; *Smith v. Allen*, 39 Miss. 469; *Pennington v. Seal*, 49 Miss. 518; *Edmonson v. Meacham*, 50 Miss. 34; *Vogler v. Montgomery*, 54 Mo. 577; *Rankin v. Shaw*, 94 N. C. 405; *Sears v. Hanks*, 14 Ohio St. 298 (84 Am. Dec. 878); *Bank v. Henderson*, 4 Humph. 75; *Wood v. Chambers*, 20 Tex. 247 (70 Am. Dec. 382); *Cox v. Shropshire*, 25 Tex. 113; *Foster v. McGregor*, 11 Vt. 595 (84 Am. Dec. 713); *Danforth v. Beattie*, 44 Vt. 138; *Shipe*

v. *Repass*, 28 Grat. 716; *Boynton v. McNeal*, 81 Grat. 456; *Marshall v. Sears*, 79 Va. 49; *Bond v. Seymour*, 1 Chand. 40; *Dreutzer v. Bell*, 11 Wis. 114; *Pike v. Miles*, 28 Wis. 164 (99 Am. Dec. 148); *Murphy v. Crouch*, 24 Wis. 365; *Bean v. Smith*, 2 Mason 252 (Fed. Cas. No. 1174); *Cox v. Wilder*, 2 Dill. 45 (Fed. Cas. No. 3308); *Smith v. Kehr*, 2 Dill. 50 (Fed. Cas. No. 13071); *McFarland v. Goodman*, 6 Biss. 111 (Fed. Cas. No. 8789). In construing N. C. Acts, 1893, ch. 78, which provides that it shall be no defense to actions to set aside fraudulent conveyances to "allege and prove that the lands therein embraced do not exceed in value the homestead allowed by law," providing, however, that the act shall "not be construed to authorize the sale of the land until after the homestead exemption has expired," it is held that this statute enables the creditors to immediately sue to set aside such a conveyance as a cloud on the title, and renders their judgment a lien on the reversion. *Younger v. Ritchie*, 116 N. C. 782 (21 S. E. Rep. 911).

Sec. 337. Setting aside — Parties. In California it is held that in order to authorize an administrator to maintain a suit to set aside the conveyance of his decedent on the ground that it was fraudulent as against creditors, there must exist creditors whose claims have been allowed or determined by judgment and there must be an insufficiency of assets to meet their demands. *Field v. Andrada*, 106 Cal. 107 (39 Pac. Rep. 323). An assignee of a creditor may maintain an action to set aside a fraudulent conveyance and such assignee or creditor is not excluded from bringing an action in case of a deceased debtor by reason of its being the duty of the legal representative to maintain such suit. *Emmons v. Barton*, 109 Cal. 662 (42 Pac. Rep. 303). The administrator of a deceased insolvent need not be made a party to an action brought by a judgment creditor to set aside a conveyance on the ground of fraud. *McClarín v. Anderson*, 104 Ala. 201 (16 So. Rep. 639). Under the Illinois statute, and amendment of June 15, 1887, it is held that an administrator has no right to bring a suit in the nature of a creditor's bill to set aside a fraudulent conveyance of his intestate. *Majorowicz v. Payson*, 153 Ill. 484 (39 N. E. Rep. 127). A fraudulent convey-

ance can be assailed only by creditors. *Baldwin v. Burt*, 48 Neb. 245 (51 N. W. Rep. 601). Under the Tex. Stat., Act of March 24, 1879, § 9, the assignee of an insolvent debtor cannot maintain an action to set aside a fraudulent conveyance "not made in contemplation of the assignment," but the creditors can. *Dittman v. Weiss*, 87 Tex. 614 (80 S. W. Rep. 868).

Sec. 338. Setting aside—Pleading—Complaint. The complaint should aver the facts necessary to show the fraudulent intent. A mere averment that the deed is without consideration is not sufficient. *Leasure v. Forquer*, 27 Ore. 884 (41 Pac. Rep. 665). Where the bill shows that the creditor is entitled to have the conveyance set aside as to a part of the property, it is sufficient. *McClarín v. Anderson*, 104 Ala. 201 (16 So. Rep. 689). Wisconsin Rev. St., § 2078, makes a conveyance executed to one person, when the consideration is paid by another, presumptively fraudulent as to the creditors of the person paying the consideration. Under this statute it is held that it is sufficient for the complaint to allege that the defendant holds the legal title to land purchased and paid for by another who was at the time of the purchase and conveyance a debtor of the plaintiff; and under §§ 8885 and 8886, it is held that one creditor may maintain an action to subject to sale the land of a decedent against which such a trust can be enforced without joining other creditors of the estate upon showing that there is not sufficient of other assets to pay debts. *Allen v. McRae*, 91 Wis. 226 (64 N. W. Rep. 889). As to the sufficiency of a complaint to set aside a fraudulent conveyance depending upon particular facts, see *Couse v. Columbia Powder Mfg. Co.*, N. J. Eq. (38 Atl. Rep. 297). A firm creditor will not be permitted to assail the conveyance of a member of his individual property unless it be shown that the firm property is insufficient. *Hull v. Wm. Deering & Co.*, 80 Md. 424 (81 Atl. Rep. 416).

Sec. 339. Setting aside—Proof—Sufficiency of. Proof that a debtor exchanged non-exempt property for exempt property and that such exchange was wholly advantageous to him is not conclusive evidence of an intention to defraud his creditors. *Kappernick v. Louk*, 90 Wis. 232 (62 N. W. Rep.

1057). Where the consideration expressed in a deed alleged to have been executed in fraud of creditors is one dollar, and there is no other consideration mentioned or referred to, in an action by a creditor of the grantor to set the deed aside on the ground that it was fraudulent, its recitals as to consideration are conclusive against the grantor, and those claiming under him. *Ogden State Bank v. Barker*, 12 Utah 18 (40 Pac. Rep. 765). Before a decree is granted on behalf of creditors setting aside a conveyance, it should be made affirmatively to appear that the creditors have been substantially injured by the transfer. *Nash v. Geraghty*, Mich. (68 N. W. Rep. 437). For cases which depend upon particular facts illustrating when conveyances will be set aside as fraudulent, see *Smith v. Mack*, Ia. (68 N. W. Rep. 181); *Folly v. Kyle*, 27 Ore. 95 (39 Pac. Rep. 999); *National Bank v. Gilmer*, 116 N. C. 684 (22 S. E. Rep. 2); *Dashiell v. Merchants' & Planters' Sav. Bank*, Va. (22 S. E. Rep. 169); *Reese v. Shell*, 95 Ga. 749 (22 S. E. Rep. 580); *Noyes v. Carter*, Va. (28 S. E. Rep. 1); *Brister v. Moore*, Miss. (16 So. Rep. 596); *Stoutz v. Huger*, 107 Ala. 248 (18 So. Rep. 126); *Uhler v. Adams*, Miss. (18 So. Rep. 367); *Wynne v. Mason*, 72 Miss. 424 (18 So. Rep. 422); *Garrett v. Wagner*, 125 Mo. 450 (28 S. W. Rep. 762); *McCaffrey v. Tiernan*, 126 Mo. 117 (28 S. W. Rep. 893); *Seiler v. Walz*, Ky. 29 S. W. Rep. 338); *Eskridge v. Carter*, Ky. (29 S. W. Rep. 748); *Merifield v. Williams*, Ky. (31 S. W. Rep. 142); *Robinson v. McCune*, 128 Mo. 577 (30 S. W. Rep. 156); *Farmers' Bank v. Stapp*, Ky. (30 S. W. Rep. 1000); *Hoffman v. Nolte*, 127 Mo. 120 (29 S. W. Rep. 1006).

Sec. 340. Setting aside—Burden of proof. The burden of proof is upon the party attacking the conveyance. *Compton, Ault & Co. v. Marshall*, 88 Tex. 50 (29 S. W. Rep. 1059). The court say: "A debtor, though insolvent, has the right, under our law, to execute in good faith a mortgage to secure one or more of his creditors, and thereby to give a preference. Such an instrument, therefore, which does not by its terms disclose a fraudulent intent, is legal upon its face, and should, as we think, be held, in the absence of proof to the

contrary, to confer the right which it purports to confer. In Wait, Fraud. Conv., § 271, the rule is thus stated: 'With the possible exception of conveyances to a wife by a husband, the burden of proof, in cases when the instrument is valid upon its face, generally rests upon the creditor to show a fraudulent intent or absence of consideration.' Mr. Bump lays down the following rule: 'As the presumption is always in favor of fairness, the statement of the payment of the consideration in an instrument is *prima facie* evidence of the fact. It is, however, the lowest species of *prima facie* evidence, inasmuch as the same motives which induce parties to make and execute a fraudulent conveyance would induce them to insert an acknowledgment of the payment and receipt of the consideration; and therefore where there is any evidence of fraud there must be other proof of the consideration.' Bump, Fraud. Conv. (8d Ed.), 594. The learned author would seem to rest the doctrine, in part at least, upon the proposition that the recital in the deed is some evidence of the fact; we think, however, the presumption of fairness in the conveyance is the safer ground upon which to base it. The authorities which lay down the contrary rule—namely, that a mere allegation attacking a conveyance or mortgage for fraud is sufficient to cast upon the party claiming under the instrument the burden of proving the payment of the consideration, or the existence of debts as the case may be—place it upon two grounds: First, that recitals in a deed are not evidence as to third parties; and, second, that the fact of the consideration is one peculiarly within the knowledge of the parties to the instrument. Should it be conceded that the recitals are not evidence, it does not follow that the instrument is not presumptively fair. While it is true that a debtor may execute a mortgage upon his property nominally to secure a fictitious debt, yet, where a mortgage has been executed, and there is nothing to show a want of good faith in the transaction, it is far more reasonable to presume that the debts are genuine than that they are simulated. As to the second ground, it is true that the fact as to the consideration or the existence of the debts is best known to him who claims under the instrument, and may not be known to his adversary. We do not think, however, that in such case this is sufficient to shift the burden of

proof from him who makes the attack upon the conveyance to him who stands upon his defense." As against the creditors of her husband the wife has the burden of showing that the consideration for a deed made to her by a third person did not come from her husband. *Kelley v. Connell*, Ala. (18 So. Rep. 9). In Indiana fraudulent intent is by statute made a question of fact and the burden of proof is upon the party seeking to set aside the conveyance and this burden is not removed by the fact that the grantee is a near relative of the grantor. *Rockland Co. v. Summerville*, 139 Ind. 695 (39 N. E. Rep. 307). There are no presumptions of fraud, but where fraud is found as a fact, its legal consequences will be attributed to it. *Personetti v. Cronkite*, 140 Ind. 586 (40 N. E. Rep. 59).

Sec. 341. Setting aside — Practice. Whether or not a debtor's secret conveyance was made in fraud of his creditors is a question of fact to be determined by the jury. *Hartley v. Millard*, 167 Pa. St. 322 (31 Atl. Rep. 641). Where a debtor conveys his homestead to his mother in consideration of a debt due her and she conveys it to the debtor's wife, in the absence of an actual fraudulent intent the creditor can only set aside such conveyances and sell the property subject to the wife's homestead and the mother's lien for her debt. *First Nat. Bank v. Rhea*, 155 Ill. 434 (40 N. E. Rep. 551). Where a judgment has been rendered setting aside a conveyance on the ground of fraud and decreeing a sale of the property to satisfy the debt, such judgment may be fully satisfied by the payment of the debt. *Kitts v. Willson*, 140 Ind. 604 (39 N. E. Rep. 313). In a proceeding to set aside a confessed judgment in favor of a mere relative of the debtor on the ground that it was largely in excess of the amount due such relative where there is no evidence offered on the part of the person obtaining such judgment, equity will maintain its validity as to whatever amount was actually due. *Merchant's Bldg. & L. Ass'n v. Barber*, N. J. Eq. (30 Atl. Rep. 865). In Utah it is held that in an action to set aside a voluntary conveyance on the ground of fraud against creditors, it is not necessary to aver or prove the insolvency of the debtor where the indebtedness is so large that the effect of the

transfer is to defraud creditors. *Ogden State Bank v. Barker*, 12 Utah 18 (40 Pac. Rep. 765).

HOMESTEAD.

HIGGINS V. BORDAGES.

(88 Tex 458.)

Homestead—Liability for assessments for municipal improvements. The provision of Tex. Con. Art. 16, § 50, subjecting a homestead to forced sale for "taxes" does not authorize such a sale to pay a special assessment made against it for municipal improvements. *Lufkin v. City of Galveston*, 58 Tex. 549, overruled.

BROWN, J.

Sec. 842. Facts Stated. The city of Beaumont was duly incorporated under the general laws of the state. The city adopted an ordinance for the construction of sidewalks in the city, providing that if the abutting property owner, upon notice, failed to make the sidewalk, the city would construct it, and the cost should constitute a lien upon the lot abutting upon it, and providing also for a foreclosure of the lien by suit in any court having jurisdiction. Henry Higgins and Mary, his wife, were living at the time upon the lot in suit as their homestead, and continued to live upon it as a homestead from that time to the time of the trial of this case. Notice was given to Henry and Mary Higgins to build the sidewalk; and, they having failed to do so within the time prescribed by the ordinance, the city had the sidewalk constructed at a cost of \$20. Higgins refusing to pay the costs of construction, suit was instituted in the district court of Jefferson county by the city of Beaumont against Henry and Mary Higgins, as husband and wife, to foreclose the lien upon the lot. The petition in that case alleged that Henry and Mary Higgins were husband and wife; that they occupied the lot at the time of the construction of the sidewalk, and the judgment entered described the lot as occupied by Henry and Mary Higgins.

The petition alleged that the city complied with the requirements of the general law and the ordinance passed by the city council in making the sidewalk. Judgment was rendered by default against William and Mary Higgins, foreclosing the lien of the city of Beaumont for the cost of said sidewalk upon the lot in question. An order of sale was issued, and the lot sold, when the plaintiff, Bordages, purchased it for \$35. He says in his evidence in this case that the lot was worth \$600. He says, also, that he knew at the time that it was the homestead of the defendants, William and Mary Higgins. Bordages sued Higgins and wife for the lot in trespass to try title; and the district court of Jefferson county, upon a trial before the court, gave judgment for plaintiff for the lot, from which judgment the defendants, Higgins and wife, appealed to the court of civil appeals, which affirmed the judgment of the district court. (28 S. W. Rep. 350.)

Sec. 343. Liability of homestead for assessment for municipal improvements—Constitutional provisions. If the district court of Jefferson county had jurisdiction of the subject matter involved in the suit of *Beaumont v. William and Mary Higgins*, then the judgment is not subject to collateral attack, and the judgment in this case must be affirmed. If, however, the court did not have jurisdiction of the subject matter in that suit, then that judgment was void, and a sale under it did not confer title upon Bordages, and the judgment in this case must be reversed. The petition having alleged that William and Mary Higgins were husband and wife, and that they occupied the land, in effect alleged that the lot was their homestead, which is in effect the recital of the judgment, besides which the proof fully establishes that fact without contradiction.

The court did not have jurisdiction of the amount of the demand, and, if the assessment for sidewalk did not by law give a lien upon the lot, then the court had no jurisdiction. It has been held by this court in a number of cases that under the charter of the city of Galveston, in which there is language identical with article 376, Rev. St., the city had a lien for like claim. Assuming, then, that ordinarily—that is, if the property were not homestead—the lien would exist in favor of the

city, the question presented for determination is, can the legislature give a lien upon a homestead for such assessments? The constitution of this state (article 16, § 50) reads as follows: "The homestead of a family shall be and is hereby protected from forced sale, for the payment of all debts except for the purchase money thereof or a part of such purchase money, the taxes due thereon or for work and material used in constructing improvements thereon, and in this last case only when the work and material are contracted for in writing, with the consent of the wife given in the same manner as is required in making a sale and conveyance of the homestead. * * * No mortgage, trust deed or other lien on the homestead shall ever be valid except for the purchase money therefor, or improvements made thereon, as hereinbefore provided, whether such mortgage or trust deed or other lien shall have been created by the husband alone or together with the wife." By the terms of the foregoing section of the constitution, the homestead is unmistakably exempted from forced sale for every kind of indebtedness which is not embraced in one of the three classes of debts named therein. The claim for which suit was instituted in the case of *City of Beaumont v. William and Mary Higgins* was not for the purchase of the lot, nor for a part of the purchase money; neither was it for improvement thereon under a contract made as required by the constitution. It necessarily follows that it cannot be enforced upon the homestead unless it comes within the meaning of "taxes due on it." We will examine the question as to whether or not the assessment for building sidewalks is a "tax," within the terms of the constitution as above quoted.

Section 9, art. 8, of the constitution contains this provision: "No county, city or town shall levy more than twenty-five cents for city or county purposes, and not to exceed fifteen cents for roads and bridges, on the one hundred dollars valuation, except for the payment of debts incurred prior to the adoption of this amendment, and for the erection of public buildings, street, sewer, and other permanent improvements not to exceed twenty-five cents on the hundred dollars valuation in any one year, and except as in this constitution otherwise provided." If the sidewalk improvement is a tax authorized by the constitution, it must be embraced in the provision

for streets, is limited in amount to twenty-five cents on the one hundred dollars, and must be levied as an *ad valorem* tax. Such a tax might be levied under this section of the constitution if authorized by law, but the assessment in this case is clearly not an exercise of the power granted in the language above quoted. If it rested upon that for its support, it would be void, because it is not uniform and equal, and exceeds the limit in amount. Section 5, art. 11, of the constitution, is in this language: "Cities having more than ten thousand inhabitants may have their charters granted or amended by special act of the legislature, and may levy, assess and collect such taxes as may be authorized by law, but no tax for any purpose shall ever be lawful, for any one year, which shall exceed two and a half per cent. of the taxable value of the property of such city," etc. The city of Houston having more than ten thousand inhabitants, levied under its charter taxes to the amount of two per cent., and, in addition, ordered the paving of streets, and that a part of the cost be assessed upon the abutting property. Such assessment having been made upon the property of a citizen which amounted to about two and one half per cent. of its value, making four and one half per cent. when added to the general tax, suit was instituted to enforce it.

Sec. 344. Same—"Taxes" and "assessments," distinguished. In the case of *Taylor v. Boyd*, 63 Tex. 538, the validity of the assessment was contested upon the ground, among others, that it, with other taxes levied, exceeded the constitutional limit. In a well-considered opinion by Judge Stayton, this court held that the assessment was not a "tax," within the meaning of the language "tax for all purposes;" and it was enforced against the property. If the assessment is not included in this broad language, then it is certainly not a "tax," within the meaning of that word as used in any part of the constitution. If it is a tax for any purpose, it could not be held not to be embraced in the language there used. A tax for any purpose must be within the terms "tax for all purposes." Section 1, art. 8, of the constitution of this state, contains this language: "Taxation shall be uniform and equal. All property in this state whether

owned by natural persons or corporations other than municipal, shall be taxed in proportion to its value, which shall be ascertained as may be prescribed by law." It has been held by this court in a number of cases, and also by courts of many other states that this and like provisions do not apply to assessments of this character, for the reason, always assigned in such cases that the assessments are not "taxes," within the intent and meaning of the constitution. *Taylor v. Boyd*, 68 Tex. 588; *Roundtree v. City of Galveston*, 42 Tex. 612; *Allen v. City of Galveston*, 51 Tex. 820. If the section of the constitution under consideration had exempted homesteads from the payment of taxes, under the authorities in this state and in many others it must have been held by this court that the exemption would not relieve such homesteads from liability for assessments for local improvements, because it is held by the courts almost unanimously that assessments of that character are not "taxes," within the meaning of such statutes and constitutions, notwithstanding the language in many cases has been as comprehensive as it could be made without expressing the very kind of demand here asserted. *County of Harris v. Boyd*, 70 Tex. 241 (7 S. W. Rep. 718); *In re Mayor etc. of New York*, 11 Johns. 77; *Northern Liberties v. St. Johns Church*, 18 Pa. St. 104; *In re College St.*, 8 R. I. 474; *Worcester Agr. Soc. v. Mayor etc. of Worcester*, 116 Mass. 189; *Sheehan v. Hospital*, 50 Mo. 155 (11 Am. Rep. 412); *Mayor etc. of Baltimore v. Greenmount Cemetery*, 7 Md. 517; *City of Paterson v. Society for Establishing Useful Manufactures*, 24 N. J. Law 885; *Canal Trustees v. City of Chicago*, 12 Ill. 408; *First Presbyterian Church v. City of Fort Wayne*, 86 Ind. 888 (10 Am. Rep. 85); Cooley, Tax'n, p. 207, Note 8. If the use of the same words would not have included this character of claim if it had expressed an exemption from taxes, how can it be said that it does include it when used to subject the homestead to the payment of taxes? We can see no sound reason for varying the meaning of the language because in the one case it would subject and in the other exempt the property. The legislature of this state enacted a law which was approved August 21, 1876, empowering the collectors of taxes for counties, cities and towns to sell the property of delinquent tax-

payers for the purpose of collecting unpaid taxes. Assessments for shelling the streets of the city of Galveston had been made against the property of certain citizens who refused to pay, and under this act the collector of the city advertised the property upon which the assessments were made for sale, to pay the unpaid assessments. Allen sued out an injunction against the sale, and the court held that the law did not confer power upon the assessor to sell the property for such assessments, because assessments of that character were not "taxes," within the meaning of that act. *Allen v. City of Galveston*, 51 Tex. 302. If an act of the legislature authorizing the sale of property for taxes unpaid would not empower the collector to sell for assessments for local improvements, it would seem that with equally strong and cogent reasoning it can be held that the authority in the constitution to sell the homestead for like taxes would not authorize the forced sale of the homestead for the same character of assessments. We can see no sound reason for drawing any distinction between the two cases when in fact no distinction can exist. In the case of *Taylor v. Boyd*, 68 Tex. 538, the court said: "The words 'tax,' 'taxes,' and 'taxation,' as used in the constitution, without some qualifying words, in reference to property, evidently mean *ad valorem* tax, taxes, and taxation." In the section of the constitution under consideration the word "taxes" is used with reference to property, and without any qualifying words, except the words "due on it," which simply limit it to the taxes due upon the particular property, and, according to the rule above quoted, must be held to mean *ad valorem* taxes; that is, the word is used with reference to the kinds of taxes mentioned in the constitution, and should be construed with reference to use of it in other portions of the constitution. In *Taylor v. Boyd*, the court said: "The power of the legislature over assessments for local improvements is to be measured by its own will, in the absence of some constitutional restrictions; and we find none such in the constitution of this state, where the power is used for the purposes for which that method of taxation has so long been deemed lawful." A careful examination of the decisions of our own and the courts of other states will show that the foregoing remark is fully justified as a correct statement of the result of the adjudications

of courts of last resort. But the constitution of this state, in the sixteenth article and the fiftieth section thereof, has, in such plain and unmistakable language, defined and limited the liability of homesteads to forced sale that no department of the state government can disregard it. From the inception of homestead exemptions in this state, the changes have all been in the direction of larger exemptions and more perfect protection. Every decision of the courts which trenched upon the liberal spirit of the constitution in that particular has been met at the next assembling of the people in convention, by provisions to meet the constructions thus given. Whether it is good or bad policy is not a question for the courts. The constitution is paramount, and must be observed and enforced.

Sec. 345. Same — Cases reviewed. In the case of *City of Galveston v. Heard*, 54 Tex. 448, the right to sell the homestead for assessment for street improvement was made, and the court waived the question as not being necessary to the determination of that case, and said: "We have no design to intimate that the defense, if established, would have been any avail." In *Lufkin v. City of Galveston*, 58 Tex. 545, the same question was presented, and the court there held that the homestead was subject to sale in satisfaction of this class of demands. The opinion was delivered by Judge West, who said: "The constitution of the state (article 16, § 50) makes no difference between the homestead and other real property as to its liability to be sold for taxes that may be due on it, nor does it draw any distinction between general and special taxes to which it may be subject. The plain import of its terms is that it is not protected from forced sale for taxes that may be due on it." No authority is cited, nor is there any inquiry as to whether or not the assessment is included in the terms of the constitution. It is assumed that the assessment is a special tax, and upon that assumption the homestead was held to be liable. Mr. Desty, in his work on Taxation, defines special taxation as follows: "Special taxation, as distinguished from taxation for general municipal purposes, is the levy of taxes to meet a special burden, either imposed by the legislature or authorized by the legal voters of the district to be taxed." 2 Desty, Tax'n, p. 1186. And we believe that

the definition might be enlarged so as to include, not only the tax levied by the legislature or voted by the voters, but also such as by law a municipal corporation may levy. As an instance of special tax authorized by the voters we mention the tax to support free schools within a city; and as an instance of that character of taxes which the legislature might authorize without such vote we would suggest that, under § 9, art. 8, of the constitution, the legislature might empower the city to levy a tax not to exceed twenty-five cents on the one hundred dollars for streets and other public improvements; and for either or both of these the homestead would be liable if levied as a tax under the constitutional limitations. The learned judge who wrote the opinion in the case of *Lufkin v. City of Galveston* said, as above quoted, that "the plain import of its [the constitution] terms is that it is not protected from taxes that may be due on it"; and again he says: "Nor does it draw any distinction between general and special taxes to which it may be subject." It is not asserted that the assessment in question is a tax, general or special, but we conclude that it must have been treated as a special tax, as it is too clear for argument that it is not a general tax. Is it a special tax? If it be a special tax, then it is taxation, and would fall within the requirement that all taxation must be uniform and equal. If a special tax, it must be a tax for some purpose, and would come under the limitation as to taxes "for all purposes." And, again, if it were a tax, though it be for a special purpose, it would be embraced in the terms of the law authorizing the collector to sell property for unpaid taxes. Our courts have held that such assessments are not included in any of these expressions, and we cannot see how it can be held to be a special tax when it has none of the characteristics of a tax in any sense in which it is used in the constitution.

Sec. 346. Same—Case overruled. We feel constrained, upon authority and sound reasoning, to hold that the charge made against the homestead of Henry and Mary Higgins for the cost of the sidewalk was not a "tax," general or special, within the meaning of section 50, art. 16, of the constitution, and that the case of *Lufkin v. City of Galveston* is in conflict with the decisions of this court; and, in so far as it holds the

homestead liable to forced sale for such assessments, that case is hereby overruled. There being no lien upon the lot sought to be subjected to sale in case of *City of Beaumont v. Higgins and wife*, and the amount claimed being for a sum less than five hundred dollars, the judgment rendered by the court foreclosing a lien upon the lot was void, and the sale of the lot under that judgment conferred no title upon Bordages. These facts, showing want of jurisdiction of the subject-matter of the suit, appeared upon the face of the record, and the nullity of the judgment will be taken notice of by any court and at any time. The district court erred in rendering judgment for the plaintiff below, and the court of civil appeals erred in affirming the judgment (in which, however, both followed *Lufkin v. City of Galveston*), for which errors the judgments of both courts are reversed, and judgment will be here rendered that the plaintiff below, T. R. Bordages, take nothing by his suit, and that the defendants, Henry Higgins and Mary Higgins, go hence without day, and that they recover of the said T. R. Bordages all costs in this case in all the courts.

Note. The holding of this case to the effect that assessments made for municipal improvements are not "taxes" within the general meaning of that term is supported by an almost unbroken line of authorities. See 3 Ballards' Annual, § 720, p. 863, and cases cited in this volume in chapter on Taxes and Tax Titles. A homestead is liable for taxes and a purchaser at a sale thereof for taxes acquires the entire estate of the homestead claimant. *Orino v. Johns*, 96 Ga. 220 (22 S. E. Rep. 913).

EPITOME OF CASES.

Sec. 347. Who may claim—Occupancy necessary. A father living on land with his two adult children who work for him without wages is entitled to a homestead as the head of a family. *Bank of Versailles v. Guthrey*, 127 Mo. 189 (29 S. W. Rep. 1004; 48 Am. St. Rep. 621). One occupying a house with a collection of persons whom he is under no obligation to support, or to whom he is in no manner related, is not a householder having a family within the meaning of the Illinois homestead act. *Holnback v. Wilson*, 159 Ill. 148 (42 N. E. Rep. 169). Under the statutes of Alabama occupancy of the property by the homestead claimant is

necessary. Ala. Code, § 2550, applied. *Turner v. Turner*, 107 Ala. 465 (18 So. Rep. 210). An indefinite and uncertain intention, made known for the first time after the sale of the land on execution, to go upon it, and claim it as a homestead, is not sufficient to create a homestead right under the statute of Kentucky. *Stovall v. Hibbs*, Ky. (32 S. W. Rep. 1087). Where one occupying land as a homestead abandons his homestead claim therein and has a fixed intention of occupying and holding other lands as his homestead as speedily as possible, but is prevented from doing so by his death, the latter place will be treated as his homestead. *Ross v. Porter* 72 Miss. 361 (16 So. Rep. 906). Where a resident of Kansas, who is the head of a family, owns two houses located upon a lot and one-half of ground containing less than one acre within the limits of a city, and occupies one of the houses with his family for living and sleeping purposes and the other for cooking and kitchen work and also cultivates the ground for his family at the time he joins in a deed of assignment with a partner for the benefit of the creditors of the firm, it is held that both of the houses constitute a part of the homestead of the debtor and his family and no part of the premises is transferred to the assignee under such deed of assignment. *Dwelling House Ins. Co. v. Osborn*, 1 Kan. App. 197 (40 Pac. Rep. 1099).

Sec. 348. Declaration of homestead. Where one has an existing right of homestead at the time of the enactment of the statute relative to declaration of homestead, the right to such homestead cannot be affected by a declaration thereof under the new statute. *Herbert v. Mayer*, 47 La. 563 (16 So. Rep. 131). Where a married man duly executes, acknowledges and files, as the "head of the family," a declaration of homestead under Cal. Civ. Code, §§ 1260-1263, such declaration inures to the benefit of his wife at the time of the filing thereof whether she has knowledge of the same or not. *Security L. & T. Co. v. Kauffman*, 108 Cal. 214 (41 Pac. Rep. 467). Particular declaration of homestead held sufficient. *In re Ogburn's Estate*, 105 Cal. 95 (38 Pac. Rep. 498). Particular facts held sufficient to constitute a declaration of homestead under the laws of Georgia. *Blacker v.*

Dunlop, 93 Ga. 819 (21 S. E. Rep. 185). Ga. Code, § 2040, applied—filing of declaration of homestead by wife. *Mutual Ben. Ass'n v. Tanner*, 96 Ga. 888 (28 S. E. Rep. 408).

Sec. 349. In what lands a homestead may be claimed. A homestead may be asserted in an undivided interest in lands. *Merchant's Nat. Bank v. Kopplin*, 1 Kan. App. 599 (42 Pac. Rep. 263); but it cannot be claimed in partnership real estate. *Michigan Trust Co.*, Mich. (64 N. W. Rep. 884). See 3 Ballards' Annual, §§ 881-884. It cannot be created by a cotenant in lands held by tenancy in common. *In re Carriger's Estate*, 107 Cal. 618 (40 Pac. Rep. 1082); *Rosenthal v. Merced Bank*, 110 Cal. 198 (42 Pac. Rep. 640). In North Carolina it is held that an estate in remainder cannot constitute a homestead, but where a creditor has a judgment against the owner of such estate which he fails to enforce before the debtor acquires an estate in possession, such debtor may have a homestead in the land as against such judgment. MacRae, J., dissenting. *Stern v. Lee*, 115 N. C. 426 (20 S. E. Rep. 786; 26 L. R. A. 814). A debtor is entitled to claim the full amount of the statutory exemption, as a homestead, although it necessitates his claiming a homestead in lands owned by him in different counties. *Springer v. Colwell*, 116 N. C. 520 (21 S. E. Rep. 801). One cannot be deprived of his right to a homestead exemption on account of the building being occupied for the purpose of the sale of intoxicating liquors, under Ia. Code, § 1558, unless the judgment sought to be enforced is one obtained for violation of the liquor law. *Groneweg v. Beck*, Ia. (62 N. W. Rep. 81). i
The statute of Vermont (Rev. Laws, § 1894) which exempts from execution "the homestead of a housekeeper or head of a family, consisting of a dwelling-house, out-buildings, and the land used in connection therewith, not exceeding five hundred dollars in value, and used or kept by such housekeeper or head of a family as a homestead," is held to protect land on which a house is being constructed for the purpose of a family residence. *Woodbury v. Warren*, 67 Vt. 251 (31 Atl. Rep. 295; 48 Am. St. Rep. 817). In Minnesota, it is held, that where blocks in the platted and laidout part of an incorporated city were generally subdivided on the plat into lots of various

sizes, but one block, urban in character, was not thus subdivided, the owner of a part thereof was entitled to hold as a homestead only a tract equal in area to the average size of platted lots in that part of the city. *Heidel v. Benedict*, 61 Minn. 170 (68 N. W. Rep. 490). In an exhaustive opinion discussing the conflicting authorities and construing Okla. Stat. 1898, ch. 84, §§ 1 and 2, it is held that a building in a city a portion of which is occupied by the owner as a residence may be entirely exempt as a homestead although the greater part of the same is rented out for the purpose of business rooms and offices, and the structure of the building is that of a business block rather than a residence. *De Ford v. Painter*, 8 Okla. 80 (41 Pac. Rep. 96). A building part of which is used as a storeroom and part as a residence was held to be a "dwelling house" within the meaning of the homestead law of Nebraska. *Corey v. Schuster*, 44 Neb. 269 (62 N. W. Rep. 470). Particular fact cases in which buildings occupied jointly as a place of residence and a place of business held exempt as homestead. *In re Ogburn's Estate*, 105 Cal. 95 (38 Pac. Rep. 498); *Groneweg v. Beck*, Ia. (62 N. W. Rep. 81). Minn. Gen. Stat. 1894, § 5521, applied — selection of homestead by insolvent in urban property. *How v. First Nat. Bank*, 61 Minn. 238 (68 N. W. Rep. 632). In the absence of any proof on the subject, a tract of land will be presumed, for the purposes of determining the extent of a homestead exemption, to be outside the limits of an incorporated city; and where it appears that an ordinance extending the boundaries of a city entirely around the tract, which was an island, was passed by the city council, but that the tract was never platted into lots, and that the owner never consented in any manner that such land should be included within the city, in the absence of any further showing, it is held that such land did not become a part of the city. To reduce the homestead exemption to one acre it is not sufficient that the land be entirely surrounded by the exterior limits of an incorporated city, but it must be included in and become a part of the city. *Topeka W. Sup. Co. v. Root*, 56 Kan. 187 (42 Pac. Rep. 715).

Sec. 350. Shifting of homestead from one tract of land to another. Under Ia. Code, §§ 2000, 2001, which provides that a homestead once acquired may be exchanged for another, and when that is done the homestead privileges and rights attach to the new as they formerly did to the old homestead, it is held that vacant land acquired by the sale or exchange of an existing homestead may be held as a homestead. *Mann v. Corrington*, Ia. (61 N. W. Rep. 409). See opinion for collation of cases construing this statute. This statute is held not to apply where the proceeds arising from the sale of a homestead are invested in an independent business, during which time creditors acquire rights relying thereupon. *Peninsular Stove Co. v. Roark*, Ia. (68 N. W. Rep. 826). For further construction of this statute, see *White v. Kinley*, Ia. (61 N. W. Rep. 176.)

Sec. 351. Exemption of homestead from debts. The right of homestead must be governed by the law in force at the time the debt to the payment of which it is sought to be subjected was created. *Stewart v. Blalock*, S. C. (22 S. E. Rep. 774). A conveyance of the homestead by a husband to his wife does not render it liable for her existing debts. *White v. Kinley*, Ia. (61 N. W. Rep. 176). One who acquires the homestead of an owner by devise holds it exempt from his debts. *Nichols v. Lancaster*, Ky. (82 S. W. Rep. 676). Where property claimed as a homestead is levied upon by an execution creditor his sale may be enjoined until he has established the lien of his judgment on such property. *Kugath v. Meyers*, 62 Minn. 399 (64 N. W. Rep. 1186). In an action by one against whom a judgment on a note has been obtained to enjoin an execution sale of his homestead thereunder, for the reason that it was acquired before the debt was contracted, he is not estopped by the judgment on the note from showing that it was executed on a day subsequent to its date. *Ingraham v. Dyer*, 125 Mo. 491 (28 S. W. Rep. 840). In construing Ga. Code, §§ 2002, 2028, 5211, it is held that an execution sale of a homestead is invalid unless the officer making the same has the affidavit of the judgment creditor that the debt is one for which the homestead may be sold under the statute, and that the debtor has

no other property subject to execution. *Davis v. Jones*, 95 Ga. 788 (28 S. E. Rep. 79). Where a statute (Mo. Rev. Stat. § 5435) exempts a homestead from forced sale to pay debts, and authorizes the owner to sell the same, the fee of the homestead cannot be sold on execution subject to the homestead right. *Bank of Versailles v. Guthrey*, 127 Mo. 189 (29 S. W. Rep. 1004; 48 Am. St. Rep. 621). In North Carolina it is held that a judgment against the owner of a homestead creates a lien on such land which may be enforced at the termination of the right of homestead. *Stern v. Lee*, 115 N. C. 486 (20 S. E. Rep. 786; 26 L. R. A. 814). A husband's homestead is not subject to the payment of a debt due from him to the state for keeping his wife in one of its asylums. *Central Ky. Lun. Asylum v. Craven*, Ky. (82 S. W. Rep. 291).

Sec. 352. Debts for which a homestead is liable. It is liable for taxes. *Crine v. Johns*, 96 Ga. 220 (22 S. E. Rep. 913); and it may be subjected to an equitable lien for materials furnished for its improvement. *Ross v. Perry*, 105 Ala. 988 (16 So. Rep. 915). A claim of homestead in land is subject to existing liens thereon. *Aldrich v. Boice*, 56 Kan. 170 (42 Pac. Rep. 695). A homestead right cannot be created as against contracts existing at the time of the enactment of the statute. *Dunagan v. Webster*, 98 Ga. 540 (21 S. E. Rep. 65); and a statute enlarging homestead rights is invalid as respects contracts made before its enactment. Minn. Gen. Stat., 1894, § 4470, applied. *Dunn v. Stevens*, 62 Minn. 380 (64 N. W. Rep. 924). In Louisiana it is held that the condition for exemption, to be effective, must date from a time prior to the date of a debt. *Hebert v. Mayer*, 47 La. 568 (17 So. Rep. 181). Under Vt. Rev. Laws, § 1076, a homestead is subject to attachment and execution upon causes of action existing at the time of its acquisition. *Titus v. Warren*, 67 Vt. 242 (81 Atl. Rep. 297). Under a statute which subjects a homestead to attachment and execution upon "causes of action existing at the time" it is acquired, the homestead is subject to a claim on a note given after its acquisition in renewal of a note given to the same person prior thereto. *Robinson v. Leach*, 67 Vt. 128 (81 Atl. Rep. 82; 48 Am. St. Rep. 807; 27

L. R. A. 303). The provisions of Ky. Gen. Stat., ch. 38, Art. 13, § 16, subjecting a homestead to debts existing at the time of its purchase cannot be defeated by the claimant asserting that the homestead was purchased with money derived from the sale of lands in another state claimed as a homestead, where it appears that the statute of such state with reference to declaring a homestead has not been complied with, and it also provides that the homestead right terminates upon the removal of the claimant from the state. *Welch v. Spragins*, Ky. (82 S. W. Rep. 943). Ky. Gen. Stat., ch. 38, art. 13, § 16, construed and applied — Liability for prior debts. *Darnell v. Smith's Ex'x*, Ky. (82 S. W. Rep. 745). It may be sold to satisfy a judgment for alimony. *Mahoney v. Mahoney*, 59 Minn. 347 (61 N. W. Rep. 334).

Sec. 353. Liability of homestead for money borrowed to pay purchase price. In construing Tenn. Const., Art. 11, § 11, which provides that "the exemption shall not operate against public taxes nor debts contracted for the purchase money of such homestead or improvements thereon," and M. & V. Code, § 2935, which provides that it shall not be exempt from sale for the payment of public taxes legally assessed upon it, or from sale for the satisfaction of any debt or liability contracted for its purchase, or legally incurred for improvements made thereon, it is held that a homestead cannot be sold to pay a debt incurred for money with which to pay the purchase price. *Loftis v. Loftis*, 94 Tenn. 232 (28 S. W. Rep. 1091). The court say: "The difficult and important question is presented in this case whether money borrowed from a third person to pay off the purchase money due the original vendor or his assignee is a debt or liability contracted for the purchase, in the sense of the statute and constitutional provision. The conflict of authority upon this point in other states is forcibly presented in the text-books. See Wap. Homest. pp. 337-346; Thomp., Homest. & Ex., §§ 338-347. See also *Magee v. Magee*, 51 Ill. 500 (99 Am. Dec. 571, note). It is said in Thompson on Homestead that it is impossible to extract any consistent rule from the cases, and in Waples on Homestead it is said that the holding in each state is largely dependent on the exact language of the statutory provision. It can

serve us but little purpose to examine the authorities of the different states in order to fix the rule in our own. After all, the matter resting wholly upon constitutional and statutory provisions, the rule to be adopted is more properly one of public policy under our statute than of conformity to the decisions of other states. We think there is a marked difference between purchase money and money borrowed to pay off purchase money, and that a debt or liability contracted for the purchase of land means a debt which has for its immediate and original consideration such purchase. So long as the original consideration of the debt remains—the purchase of land—the homestead cannot prevail as against it, even though the debt be assigned or renewed or extended. *Bentley v. Jordan*, 3 Lea. 353, *Smith v. High*, 85 N. C. 93; *Fox v. Brooks*, 88 N. C. 234; *Kimble v. Esworthy*, 6 Ill. App. 517; *Williams v. Jones*, 100 Ill. 362. But when the original purchase money is paid by the use of other money borrowed from a third person for that purpose, the consideration of the debt is no longer purchase money, but borrowed money, and the debt incurred for borrowed money is not superior to the homestead. If we hold that money borrowed to pay off purchase money must be held superior to the homestead, then it logically follows that money borrowed to pay off such borrowed money must also be held superior and this rule must continue through as many removes and borrowing transactions as the needy debtor may be forced to make through a series of years, until he is able to discharge all obligations based upon the original borrowing. This would not be a sound rule, nor in accord with the trend of our decisions, favoring and protecting the homestead. The priority extended to debts contracted for the purchase money of land is not the same as the vendor's lien for purchase money, and is in no wise dependent on the question whether the vendor has retained such lien. It is a separate lien, charge, or incumbrance, arising out of the statute and constitutional provisions, and may be enforced by judgment and execution at law, irrespective of the vendor's lien. The party who pays off such purchase money is not thereby substituted to the priority in favor of the original debt, and, if he secure himself by mortgage, his rights will depend upon the mortgage, and not upon the original transaction. It may be said that it is unjust to

allow the purchaser to claim the homestead when he has not, in fact, paid for the same; but it is no more unjust than it is to allow the purchaser of any other property, real or personal, to retain the same when it has not been paid for. Besides, it cannot, in our view, be said that the debt incurred for the purchase money is unpaid when it has been discharged by the creation of a new obligation, based primarily upon another consideration. When money is borrowed by the purchaser after the purchase has been made, and by him paid in discharge of the original purchase money, it is no longer a debt incurred for the purchase, for that is paid, but is for borrowed money, and it has no priority, as against the homestead, because of its use in paying off purchase money. *Eyster v. Hatheway*, 50 Ill. 521; *Magee v. Magee*, 51 Ill. 500 (99 Am. Dec. 574); *Dreese v. Myers*, 52 Kan. 126 (84 Pac. Rep. 849; 89 Am. St. Rep. 886); *Thomp. Homest. & Ex. §§ 842, 848.*" In Kentucky it is held that a homestead is liable for money borrowed with which to pay part of the purchase price. *Coleman's Adm'r v. Parrott*, Ky. (32 S. W. Rep. 679).

Sec. 354. Exemption of homestead insurance money. Money due from an insurance company upon a policy of insurance issued upon the homestead is not subject to garnishment at the suit of a creditor. *Swayne v. Chase*, 88 Tex. 218 (80 S. W. Rep. 1049). Citing, *Cameron v. Fay*, 55 Tex. 58; *Bernheim v. Davitt*, Ky. (5 S. W. Rep. 198); *Mulliken v. Winter*, 2 Duv. 257 (87 Am. Dec. 495); *Reynolds v. Haines*, 88 Ia. 842 (49 N. W. Rep. 851; 22 Am. St. Rep. 811; 18 L. R. A. 719); *Houghton v. Lee*, 50 Cal. 101; *Cooney v. Cooney*, 65 Barb. 524; *Tillotson v. Wolcott*, 48 N. Y. 188; *Wyman v. Wyman*, 26 N. Y. 258; *Leavitt v. Metcalf*, 2 Vt. 842 (19 Am. Dec. 718); *Stebbins v. Peeler*, 29 Vt. 289; *Culbertson v. Cox*, 29 Minn. 809 (18 N. W. Rep. 177; 48 Am. Rep. 204); *Probst v. Scott*, 81 Ark. 652; *Mudge v. Lanning*, 68 Ia. 641 (27 N. W. Rep. 793); *Kaiser v. Seaton*, 62 Ia. 468 (17 N. W. Rep. 664).

Sec 355. Right of surviving husband, wife and children. The assignment of a homestead in land of an intestate does not affect the rights of the heirs under the statute of distribution. *Stewart v. Blalock*, S. C. (22 S. E. Rep.

774). The fact that a surviving wife has an undivided absolute interest in the homestead property does not affect her homestead rights therein. *Stull v. Graham*, 60 Ark. 461 (31 S. W. Rep. 46). Under the Missouri homestead act of 1865, a surviving widow takes the fee of the homestead, subject only to the possessory rights of infant children during minority, which descends to her heirs at her death. *Linville v. Hartley*, 180 Mo. 252 (82 S. W. Rep. 652). Citing numerous cases. The homestead rights of a surviving wife in land are not affected by her having previously taken a conveyance of it in settlement of a judgment for alimony rendered in her favor, which conveyance was confirmed by the court, although the husband's object in making it was to defraud creditors. *Howell v. Thompson*, 95 Tenn. 396 (32 S. W. Rep. 309). The right of a widow to a homestead allotment is not defeated by the fact that there are liens on the property subject to the homestead right. *Jackson v. Sheffield*, 107 Ala. 358 (18 So. Rep. 106). A statutory provision (N. C. Const., Art. 10, § 8) providing that "the homestead, on the death of the owner, shall be exempt from the payment of any debt during the minority of his children," inures to the benefit of the minor children of a homesteader who has conveyed the land to another, as against his prior judgment creditors. Clark, J., dissenting. *Stern v. Lee*, 115 N. C. 426 (20 S. E. Rep. 736; 26 L. R. A. 814). In construing Nev. Gen. Stat., § 539, which provides that the husband and the wife, or either of them, or other head of a family, may make and file a declaration of homestead, and that thereafter "the husband and wife shall be deemed to hold said homestead as joint tenants," it is held that a homestead, duly filed on while husband and wife were residing thereon, remains a homestead in his hands after her death, and as such is exempt from levy and sale for his debts, where he continues to reside upon it, although he has no children or other dependent relatives residing with him. *Roberts v. Greer*, 107 Nev. 465 (40 Pac. Rep. 6). Ala. Code 1886, §§ 2507, 2548, 2550, 2554, applied—setting aside homestead to widow. *Turner v. Turner*, 107 Ala. 465 (18 So. Rep. 210). Ark. Const., Art. 9, § 6, construed and applied—rights of widow and surviving children. *Sparkman v. Roberts*, 61 Ark. 26 (31 S. W. Rep. 742). Under Wis.

Laws 1864, ch. 270, § 1, the owner of a homestead may dispose of the same by will and charge it thereby with the payment of debts and legacies. *Turner v. Oberheu*, 89 Wis. 1 (61 N. W. Rep. 280).

Sec. 356. Abandonment, loss or waiver of homestead. To establish an abandonment of a homestead, the evidence must show, not only that the party removed from the homestead, but that he did so with the intention of not returning; or, after such removal, he formed the intention of remaining away. The fact that the owner of a homestead exercises the right of suffrage at a place to which he had removed upon a temporary absence from his homestead does not of itself establish an intention on his part to abandon such homestead. *Cory v. Schuster*, 44 Neb. 269 (62 N. W. Rep. 470). Under a statute (Sanb. & B. Wis. Stat., § 2988) which provides that a homestead shall not be affected by a "temporary removal" therefrom it is held that such a removal means a removal for a fixed and temporary purpose, or for a temporary reason. *Moore v. Smead*, 89 Wis. 558 (62 N. W. Rep. 426). Particular facts held to constitute an abandonment of the homestead and not "a temporary removal" within this statute. *Blackburn v. Lake Shore Traffic Co.*, 90 Wis. 362 (68 N. W. Rep. 289). One who removes from his homestead and leases it to another thereby abandons it. *Blackman v. Moore-Handley H. Co.*, 106 Ala. 458 (17 So. Rep. 629). One who removed from his homestead farm and purchased a residence in a town and entered into the mercantile business was held to have abandoned his homestead in the farm although he intended to retain it, and to come back to it "if he quit business." *Wolf v. Hawkins*, 60 Ark. 262 (29 S. W. Rep. 892). Citing, *Lehman v. Bryan*, 67 Ala. 558; *Kimball v. Wilson*, 59 Iowa 688 (18 N. W. Rep. 748); *Smith v. Bunn*, 75 Mo. 559. One who removes from his homestead temporarily with an intention of returning, which intention remains unchanged, does not lose his homestead because his absence therefrom is prolonged by unforeseen circumstances. *Campbell v. Potter*, Ky. (29 S. W. Rep. 139). A husband, his wife being insane, who stored his goods in his homestead dwelling and slept there part of the time, was held not to have aband-

oned his homestead. *Central Ky. Lun. Asylum v. Craven*, Ky. (82 S. W. Rep. 291). A mere temporary removal from a homestead, leaving it in possession of a tenant under a contract to surrender possession on demand, was held not to constitute an abandonment. *Derickson v. Gillespie*, Ky. (82 S. W. Rep. 1084). An abandonment of the homestead does not relate back so as to give validity to a previous execution sale of such homestead which was void when it was made. *Asher v. Sekofsky*, 10 Wash. St. 379 (38 Pac. Rep. 1133). S. C. Code, § 2130, applied—waiver of homestead by alienation of property before assignment. *Ex parte Allison*, S. C. (23 S. E. Rep. 62). Miss. Code, § 1981, applied—particular facts held sufficient to constitute an abandonment of a homestead. *Salter v. Embrey*, Miss. (18 So. Rep. 378).

Sec. 357. Power of husband to effect an abandonment of the homestead without his wife's consent. In Texas it is held that a homestead may be abandoned by the conveyance thereof by the husband, his wife not joining therein, and their removal to other lands acquired by the husband for a homestead, although such conveyance and removal was against the desire of the wife. *Marler v. Handy*, 88 Tex. 421 (31 S. W. Rep. 636). The court say: "In the case of *Slavin v. Wheeler*, 61 Tex. 654, the husband and wife had occupied a homestead in the country, from which they removed and acquired another in a small town, on which they were residing when the husband, without being joined by his wife, conveyed the former homestead. It was contended that as the wife did not consent to the making of the deed, and had always claimed the country place as her home, the deed conveyed no title. Judge Sayton, delivering the opinion said: 'It is contended in this case that a homestead is not abandoned so long as the wife, who may have voluntarily removed to another with her husband and children, may retain an intention to return to it, even though the husband may have no such intention, and may have provided another, of which he or the community is the owner, equally as valuable, comfortable, and every way desirable as the one formerly occupied, and suited to his business. In other words, it is contended

that the right to determine where the home shall be depends on the arbitrary will of a wife. Such a proposition finds no sanction in law, and is in opposition to those laws of nature which make the husband the natural head and protector of the family, whose will, when justly and not capriciously or fraudulently exercised, to enable him properly to fulfill this high trust, ought not to be lightly disregarded. The constitution protects to the wife the home of the family, and any attempt of the husband fraudulently to abandon it, prompted by malice or desire to deprive the wife of a home, would prove futile. There is nothing in this case to indicate any such disposition. Were there, her right to protect herself in a home in such case has been recognized by this court in many cases. There cannot be one homestead for the wife and another for the husband, for the law protects but one to the entire family. No good reason can be given why, in the absence of some wrong by the husband, the determination of where the home shall be shall be left to the wife.' Judge Stayton then quoted from *Guiod v. Guiod*, 14 Cal. 507 (76 Am. Dec. 440), as follows: 'She is bound by her marital obligations to live with him, and, when he changes his place of residence, she must accompany him. There is no obligation resting upon him to permanently occupy the same place. Indeed, the highest interests of himself and family, their health and maintenance, and the proper education of his children, may require a relinquishment of the homestead.' Thomp. Homesteads, § 276; *Jordan v. Godman*, 19 Tex. 278. From these authorities and we believe, upon sound principle, the rule may be stated that the husband, acting in good faith, may select the homestead of the family; and that when he has acquired a new home, and his wife has removed with him to the newly-acquired homestead, a deed made by him without her concurrence, to the former homestead, becomes operative as to the husband as an estoppel against his right to recover the property. The wife's right, being that of homestead, only ceases when a new homestead has been acquired, and she removes thereto." In Georgia the homestead right cannot be waived by the head of the family. *Sharp v. Amer. Freehold L. Mort. Co.*, 95 Ga. 415 (22 S. E. Rep. 688).

Sec. 358. Conveyance and incumbrance of homestead—Necessity of joint conveyance of husband and wife. Ark. Act, March 18, 1887, which provides that the husband's conveyance of the homestead shall be invalid "unless his wife joins in the execution of such instrument, and acknowledges the same," is not complied with by a mere acknowledgment by the wife of the relinquishment of dower. *Bank of Harrison v. Gibson*, 60 Ark. 269 (30 S. W. Rep. 89). Under Cal. Civ. Code, § 1241, a mortgage upon a homestead executed by a husband alone is void as to his wife. *Van Sandt v. Alvis*, 109 Cal. 165 (41 Pac. Rep. 1014). The fact that a woman other than the mortgagor's wife joined in the execution of a mortgage on the homestead does not prevent the mortgagor's lawful wife from claiming the mortgage to be void as to the homestead. *Security L. & T. Co. v. Kauffman*, 108 Cal. 214 (41 Pac. Rep. 467). In Illinois it is held that a deed to a homestead, by the claimant, even to his or her wife or husband, not subscribed or acknowledged by such wife or husband, possession not being abandoned or given pursuant to such conveyance, is a nullity. *Anderson v. Smith*, 159 Ill. 93 (42 N. E. Rep. 806). Under a statute (Ia. Code, § 1990), which provides that "a conveyance or incumbrance by the owner is of no validity unless the husband and wife, if the owner is married, concur in and sign the same joint instrument," it is held that a mortgage of a homestead signed by a husband and wife, in the granting part of which the husband is not named, is void, and does not become valid as to them by their recognition of it in a subsequent mortgage duly executed. *Seiffert & Wiese L. Co. v. Hartwell*, Ia. (63 N. W. Rep. 383). Under the statute of Kansas which provides that the alienation or incumbrance of a homestead must be with the "joint consent of husband and wife," it is held that where a wife duly executed the power of attorney to her husband appointing and authorizing him, as her lawful attorney, "to sign deeds and mortgages, notes, checks, releases, etc., to loan moneys, to sue and be sued, to collect rents, make contracts, giving and granting unto my said attorney full power and authority to do and perform all and any acts and things whatsoever requisite and necessary to be done in and about the premises, as fully and to all intents and pur-

poses as I might or could do if present, with full power of substitution and ratification, hereby ratifying and confirming all that my said attorney or his substitutes shall lawfully do or cause to be done by virtue thereof," which power was duly recorded, a mortgage on the homestead executed more than two years thereafter by a husband, which he signed for himself, and also signed as attorney in fact for his wife, is invalid: Johnston, J., dissenting. *Wallace v. Travelers' Ins. Co.*, 54 Kan. 442 (88 Pac. Rep. 489; 26 L. R. A. 806; 45 Am. St. Rep. 288). Under the statute here referred to it is held that a lease of the homestead for several years signed only by the husband is an absolute nullity although the wife consented to it and would have signed it had she been requested to do so. *Wea Gas, Coal & Oil Co. v. Franklin L. Co.*, 54 Kan. 588 (88 Pac. Rep. 790; 45 Am. St. Rep. 297). In Kentucky a release signed by a husband and a wife, but not acknowledged and recorded as required by statute, is void. *Tabler v. Sullivan*, Ky. (29 S. W. Rep. 972). As to power of husband to effect a transfer of the homestead by an abandonment thereof without the wife's consent, see the preceding section.

Sec. 359. Conveyance of homestead—Joinder by insane wife. Where statute requires a joint conveyance of husband and wife such a conveyance executed at a time when the wife is insane is void. *Thompson v. New England Mort. Sec. Co.*, Ala. (18 So. Rep. 815). The court say: "The insanity of the wife does not dissolve the bonds of marriage, nor withdraw her or her family from the beneficent purpose of the homestead laws. The statute is plain, unambiguous, and admits of no exceptions which would destroy its obvious design. If the occupant be a married man, the voluntary signature and assent of the wife, evidenced in the manner prescribed, are essential to a valid alienation of the homestead, unless the conveyance be made to her. Efforts have been made to ingraft other exceptions, arising out of the supposed necessities of the case, upon similar statutes, but they have uniformly failed. Thus, the fact that the wife is living apart from her husband, and even in another state, has been held insufficient to dispense with her signature and assent. *Johnson v. Turner*, 29 Ark. 280; *Williams v. Swetland*, 10 Iowa

51; *Herron v. Knapp, Stout & Co.*, 72 Wis. 558 (40 N. W. Rep. 149); *Bradford v. Trust Co.*, 47 Kan. 587 (28 Pac. Rep. 702); *Ott v. Sprague*, 27 Kan. 620; *Lies v. De Diablar*, 12 Cal. 327; *Castlebury v. Maynard*, 95 N. C. 281. In a note to *Poole v. Gerrard*, 6 Cal. 71 (65 Am. Dec. 481), on page 488, Mr. Freeman says, 'That the wife is living apart from her husband, or insane, will not render his sole conveyance of the premises valid.' One of the cases he cites, *Alexander v. Yennum*, 61 Iowa 160 (16 N. W. Rep. 80), is directly in point upon the question we are considering; and the later case of *Whitlock v. Gosson*, 35 Neb. 829 (53 N. W. Rep. 980), is to the same effect. No cases in conflict with these have been cited, and, after diligent search, we have found none."

Sec. 360. Miscellaneous notes. In determining the intention of one to claim certain real estate as a homestead, his acts with reference thereto, even after its sale under execution, are admissible in evidence. *Gallagher v. Keller*, 87 Tex. 472 (29 S. W. Rep. 647). A probate homestead cannot be set apart in lands in which the deceased could not have declared a homestead in his lifetime. *In re Carriger's Estate*, 107 Cal. 618 (40 Pac. Rep. 1032). In Georgia it is held that the homestead right continues as long as there are beneficiaries entitled to enjoy it, and the holder of the legal title cannot defeat this right by conveying the premises to one of the beneficiaries or to any one else, and deprive the other beneficiaries of the use of the estate, whether they be the original beneficiaries or new beneficiaries added to the family by a second marriage and the birth of children after the deed was made. *Blacker v. Dunlop*, 93 Ga. 819 (21 S. E. Rep. 135). Tex. Const., Art. 16, § 51, which exempts land as a homestead to the amount of \$5,000 in value, excluding "the value of any improvements thereon," is held to exempt the improvements on a homestead, no matter what the extent of their value, and although the claimant has evidently invested money in such improvements for the purpose of defrauding creditors. *Swayne v. Chase*, 88 Tex. 218 (30 S. W. Rep. 1049). A decree foreclosing a mortgage on a homestead does not bar the right of the mortgagor to claim the surplus arising upon such foreclosure sale, in lieu of his homestead, as against other judg-

ment creditors. *Hooper v. Castetter*, 45 Neb. 67 (68 N. W. Rep. 185). Ala. Code, §§ 2526, 2584, applied—valuation of homestead. *Moore v. Scharf*, Ala. (17 So. Rep. 938). In Pennsylvania a claim for exemption need not be in writing and may be made within a reasonable time after the defendant has notice of the writ, provided it does not cause a delay. *Hart v. Hart*, 167 Pa. 13 (81 Atl. Rep. 852). Under Pa. Act, 1849, a claim for exemption made six days after the first advertisement of the sale, and only ten days before the sale, should not be rejected. *Snyder v. Schmick*, 166 Pa. 429 (81 Atl. Rep. 124).

HUSBAND AND WIFE.

HILES V. FISHER.

(144 N. Y. 306).

Tenancy by entireties—Married women's statute—Control of estate—Mortgage by husband. The statute of New York enabling married women to hold and enjoy their separate real estate did not abrogate the common law doctrine of tenancy by entireties, but the right of the husband to the exclusive control and use of an estate held by entireties, not being an incident of such an estate but a part of his common law marital rights, was abolished by this statute; and since its enactment a husband and wife are tenants in common as to the control, rents and profits of such estates. The husband's mortgage of such estate will pass to the purchaser thereunder all his interest subject to the wife's right of survivorship, with the right to use an undivided half of the land during the joint lives of husband and wife.

Sec. 361. Facts stated. Appeal from judgment of general term, Fourth department, on submission of controversy without action under § 1279 of the Code, stating substantially the following facts: The defendants are, and for the past thirty years and upwards have been, husband and wife. On or about the 22d of March, 1866, the defendants, by a deed to them as husband and wife, took title to a farm of about forty-four acres in the town of Dryden, Tompkins county, N. Y., which they have ever since occupied and possessed as their

home under said deed with no other title. This deed runs to "William R. Fisher, of the town, county, and state aforesaid, and Maria J. Fisher, his wife," and the consideration therein stated is three thousand dollars. It was duly recorded on the 9th of May, 1866. The purchase price was wholly paid by the wife, who, however, consented to the form of the deed as taken by them. On or about March 31, 1885, the defendant, William R. Fisher, borrowed of the plaintiff one thousand four hundred dollars, for which he and his wife gave their promissory note. On or about February 20, 1886, William R. Fisher, to secure the payment of this debt to plaintiff, and other small amounts of borrowed money, amounting then altogether to one thousand five hundred and fifty dollars, executed and delivered to one Goodrich, for plaintiff, a mortgage in the usual form, granting and conveying the said forty-four acres, and conditioned for the payment of one thousand five hundred and fifty dollars, one-half in one year and the balance in two years, with interest at 5 per cent. annually. This mortgage was dated and acknowledged February 20, 1886, and was immediately assigned to plaintiff. It was recorded August 5, 1890. Fisher, of the money which he borrowed of plaintiff, used one thousand dollars, in part payment of thirty-five acres of land in the same town, the title to which he had taken in his own name. At the time the mortgage was given the plaintiff knew that the wife's money paid for the forty acres, and that she refused to sign the mortgage, but he supposed that William R. Fisher held the title, and the wife had only her dower right therein, and he therefore said that the mortgage was good enough without her signature, and so took it; and he told the defendants that he did not calculate that William R. Fisher should ever pay the mortgage; that he calculated to give it to him by his will, and all he wanted was the interest while he lived. The description in the mortgage was copied from the deed, which was present when the mortgage was executed and delivered. On 3d of September, 1890, William R. Fisher conveyed to Maria J. Fisher both of said parcels of land by quitclaim deed recorded that day. Default was made in the payment of interest on the mortgage, and it was duly foreclosed by statutory foreclosure, and on the sale thereunder, which occurred February 6, 1892, the premises

were bid in by the plaintiff for the sum of five hundred dollars, the amount then unpaid on the mortgage being one thousand eight hundred and sixty-three dollars and thirty-seven cents, besides the expense of foreclosure, thereby vesting in plaintiff the entire fee so far as the mortgagor could lawfully have conveyed at the date of the mortgage under the same circumstances. Notice of the foreclosure was duly served on both defendants. Mrs. Fisher thereafter, and before the sale, commenced an action in the supreme court against the plaintiff and said Goodrich and her husband, asking that the mortgage be declared void as to her, and be set aside as a cloud upon her title, and that the foreclosure of the mortgage be restrained. A temporary injunction was obtained, but vacated by the court upon the papers upon which it was granted. On the foreclosure sale Mrs. Fisher gave notice of her claims. After the sale the plaintiff duly demanded possession of each of the defendants, and they severally refused to deliver the same, and now withhold it. Upon these facts the plaintiff claimed the right to recover the premises, with the right to hold the same during the joint lives of the husband and wife, and in fee in case the husband survives the wife. The defendant Mrs. Fisher claims that the mortgage, not having been signed by her, was void, and that, Mr. Fisher's interest having been conveyed to her, she is the absolute owner; that by reason of her having paid for the property she is equitable owner of the whole; that, in any event, she is entitled to the possession during the joint lives of herself and husband, and to the fee in case she survives. The general term rendered judgment adjudging that by the sale under the mortgage the plaintiff acquired the right of possession of the whole property during the joint lives of Mr. and Mrs. Fisher, and to the fee in case the husband survives the wife.

ANDREWS, C. J.

Sec. 362. Tenancy by entireties—Effect of married women's statute. It was decided in *Bertles v. Nunan*, 92 N. Y. 152 (44 Am. Rep. 861), that the separate property acts relating to the rights of married women had not abrogated the common-law doctrine; that under a conveyance to husband and wife they take not as tenants in common, nor as joint

tenants, but by the entirety, and upon the death of either the survivor takes the whole estate. In that case the husband had died, leaving his wife surviving, and the question was whether the wife, as survivor, took upon the death of her husband the entire fee under the doctrine of the common law. The question, what change, if any, had been wrought by the separate property acts in respect to the common-law rights of the husband to control and use the property conveyed to husband and wife during their joint lives, was not considered or decided, but was expressly reserved, on the ground that it was not involved in the case then before the court. That question is involved in the present case, and must now be decided. The decision in *Bertles v. Nunan* is supported by the great weight of authority in other jurisdictions in this country, but in some of the states it has been held that, as a consequence of statutory provisions substantially like those in this state, conferring upon married women the right to take and hold separate property to their own use, free from the control of their husbands, as *femes sole*, estates by entireties have been abrogated, and turned into tenancies in common. In the states where this construction has been put upon the married women's acts, the question of the rights of the parties to the usufruct during their joint lives could scarcely arise, because it is one of the generally admitted results of this legislation that the common-law right vested in the husband to the rents, profits, and use of his wife's real estate during their joint lives has been destroyed.

Sec. 363. Same—Control of estate — Husband's rights at common law. It is, however, a much more serious question what the effect of this legislation is upon the common-law right of the husband to the usufruct during the joint lives of the husband and wife, of lands conveyed to them jointly, in those states where it is held that, notwithstanding the legislation, a conveyance to husband and wife retains its common-law character and incidents. If the right of the husband to the use during the joint lives of lands held under this tenure was a right growing out of and incident to this particular species of tenancy—in other words, if it was one of its specific and essential characteristics, then it would be difficult to seg-

regate this right from the other rights incident to and flowing from the tenancy, and to say that, while the estate by entireties continues, this feature of it was intended to be taken away. But the taking away from the husband the usufruct during the joint lives of lands conveyed to husband and wife would not be inconsistent with the continuance of tenancies by entireties, provided the common-law right to the usufruct was not an incident of the tenancy, but of the marital right operating upon property so held as upon all other real property of the wife. The grand characteristic which distinguishes a tenancy by the entirety from a joint tenancy is its inseverability, whereby neither the husband nor the wife, without the assent of the other, can dispose of any part of the estate so as to affect the right of survivorship in the other. Bl. Comm. 182; Washb. Real Prop. 425. Each is said to be seized of the whole estate, and they do not take by moieties, and the reason assigned in the old books for this anomalous characteristic of this estate is the legal unity of the husband and wife and the incapacity of the wife to hold a separate and severable estate in lands under a joint conveyance to both. The alleged incapacity of a wife to take and hold lands conveyed to husband and wife as joint tenant or tenant in common with him seems inconsistent with the doctrine which has finally obtained—that by express words of a grant or devise to husband and wife that species of tenure would be created. This was pointed out in *Miner v. Brown*, 133 N. Y. 308 (81 N. E. Rep. 24), and authorities were cited to show that where the intention disclosed by the deed or will was to create a tenancy in common, that estate would be created. See, also, *McDermott v. French*, 15 N. J. Eq. 78; *Wales v. Coffin*, 13 Allen. 213; 1 Washb. Real Prop. 425. There is a tendency now to regard the creation of an estate by the entirety as resting upon a rule of construction rather than upon a rule of law, and to regard the intention as disclosed by the deed or will creating it as the governing rule for determining whether that estate was created rather than a joint tenancy or tenancy in common. See *in re March*, 27 Ch. Div. 166, and cases before cited. It was conceded under the old law that husband and wife, who were joint tenants or tenants in common of lands before marriage, remained so afterwards.

Co. Lit. 187b. It would seem to follow that there was no general incapacity in the wife to hold lands with the husband in joint tenancy or as tenant in common. The quality of the estate held by the husband and wife as tenants by the entirety, in the aspect of its inseverability, has been adverted to. But it is important, in view of the subsequent discussion, to observe that the wife, as well as the husband, took an estate under a grant to both. Each was said to be seised of the whole, and not of any separate part. Neither could convey his or her interest to the prejudice of the right of survivorship of the other. The common law, however, wholly ignored this principle of equality between husband and wife in regulating the rights of the parties to the enjoyment of the estate during the joint lives. They were not regarded as having a joint seisin or a joint possession for the purpose of the use during coverture. The husband was held to be entitled to the full control, and to take the rents and profits of the land during the joint lives, to the exclusion of the wife; and he had power to sell, mortgage or lease for the same period; and this life interest was, according to the weight of authority, subject to the claims of his creditors. *Barber v. Harris*, 15 Wend. 615; *Jackson v. McConnell*, 19 Wend. 175; *Meeker v. Wright*, 76 N. Y. 282; *Bertles v. Nunan*, 92 N. Y. 152 (44 Am. Rep. 360); *Ames v. Norman*, 4 Sneed 683 (70 Am. Dec. 269); *Pray v. Stebbins*, 141 Mass. 219 (4 N. E. Rep. 824; 55 Am. Rep. 462). But the right of the husband at common law to take rents and profits of lands held by him and his wife as tenants by the entirety, during the coverture, and to assign and dispose of them during that period, did not, we apprehend, spring from the peculiar nature of this estate. He acquired no such right by force of the conveyance itself, and it was not an incident thereto. It was a right which followed the conveyance and inured to the husband from the general principle of the common law which vested in the husband, *jure uxoris*, the rents and profits of his wife's lands during their joint lives. 2 Kent Comm. 180; Stew. Husb. & wife, § 808. The husband took the rents and profits of lands held in entirety upon the same right that he took the rents and profits of her other real estate, whether held by a sole or joint title, namely his right as hus-

band. In none of the definitions of tenancies by entireties have we found any suggestion that this was one of the incidents or characteristics of such estates, and we think it is plain, both upon reason and analogy, that it had its origin in those harsh principles of common law which destroyed for most purposes the legal identity of the wife, and subjected her person and property to the control of her husband.

Sec. 364. Same—Control of estate—Effect of married women's statute. In considering what effect, if any, the legislation in this state has had upon the right of the husband to the rents, profits, and control of lands held by him and his wife in entirety during their joint lives, it is important to regard, not only the language, but the spirit, of the new enactments. The sole purpose of the original statute of 1848 was to secure to married woman the enjoyment of their real and personal property which belonged to them at the time of their marriage, or which they might thereafter acquire by gift, grant, or bequest from third persons, and to abrogate the common-law right of the husband in and to the real and personal property of the wife. The right to the rents and profits of her lands, *jure uxoris*, during the joint lives was completely swept away, not by express enactment, but as a necessary consequence of investing her with the beneficial use of her own property, free from his control. Subsequent legislation confirmed her rights as defined by the act of 1848, and enlarged them in other directions, but the act of 1848 was the seed from which all the subsequent legislation sprung. This legislation rendered unnecessary any longer the cumbrous mechanism of settlements or resort to the imperfect powers of courts of chancery to secure to married women their enjoyment of their own property. In determining the question now before us, too much emphasis cannot be placed upon the fact that the legislation of 1848 and the subsequent years uprooted the principle of the common law, hoary with age, which vested in the husband, by virtue of the marriage relation, control of the property of his wife, and the right to exclude her from its enjoyment. If it is still held, notwithstanding this legislation, that the husband takes the whole rents and profits, during coverture, in lands held in entirety and may exclude the wife

from any participation therein, an exception is allowed, standing upon no principle, and it deprives the wife, although she has an undoubted interest and estate in the land, from any benefit thereof during the lives of both. There are, as we can perceive, but two other alternatives—either the rents and profits follow the nature of the estate, and can neither be disposed of nor charged except by the joint act of both husband and wife, which seems to be the view taken in *McCurdy v. Canning*, 64 Pa. St. 39; or the parties become tenants in common or joint tenants of the use, each being entitled to one-half of the rents and profits during the joint lives, with power to each to dispose of or to charge his or her moiety during the same period, which seems to be the view taken in *Buttler v. Rosenblath*, 42 N. J. Eq. 651 (9 Atl. Rep. 695). We think the rule adopted in New Jersey best reconciles the difficulties surrounding the subject. The estate granted is not thereby changed. It leaves it untouched, with all its common-law incidents. It deals with the rents and profits and the use and control of the estate during coverture only, and gives to each party equal right so long as the question of survivorship is in abeyance, thereby conforming to the intention of the new legislation to take away the husband's right, *jure uxoris*, in his wife's property, and to enable the wife to have and enjoy "whatever estate she gets by any conveyance made to her, or to her and others jointly, and does not enlarge or diminish that estate." The rule in Pennsylvania not only deprives the husband of his common-law right to the enjoyment of the whole rents and profits, but of the enjoyment of any share thereof, except with the concurrence and permission of his wife.

Sec. 365. Same—Mortgage by husband—Rights of purchaser under. The conclusion we have reached requires a reversal of the judgment below, so far as it adjudges that the mortgage executed by the husband to the plaintiff, and the sale thereunder, vested in the plaintiff the right to the possession of the whole estate during the joint lives of Mr. and Mrs. Fisher. The husband had a right to mortgage his interest, which was a right to the use of an undivided half of the estate during the joint lives, and to the fee in case he survived his

wife; and by the foreclosure and sale the plaintiff acquired this interest, and became a tenant, in common with the wife, of the premises, subject to her right of survivorship. The opinion of the general term exhibits with great clearness the reasons upon which it was held that a conveyance or mortgage by the husband, without restrictive words, binds the fee in case he survives the wife. See 1 Washb. Real. Prop. 425, 1 Prest. Est. 135; *Ames v. Norman*, 4 Sneed, 683 (70 Am. Dec. 269). The judgment below should be modified in accordance with this opinion, and, as modified, affirmed, without cost to either party. All concur, except Haight, J., not sitting. Judgment accordingly.

Sec. 366. Incumbrance of estates by entreties—Liability for debts. The doctrine laid down in the case reported is expressly followed in the late case of *Branch v. Polk*, 61 Ark. 388 (33 S. W. Rep. 424; 30 L. R. A. 324), where it is held that a mortgage executed by the wife alone will bind her interest in such estate. In Tennessee the husband's rights in an estate by entreties may be sold on execution issued against him for his debts. *Ames v. Norman*, 4 Sneed 683 (70 Am. Dec. 269); *Cole Mfg. Co. v. Collier*, 95 Tenn. 115 (31 S. W. Rep. 1000; 30 L. R. A. 315); but the last case decides that Mill & V. Code, § 3338, which provides that "the interest of the husband in the real estate of his wife acquired by her * * * shall not be sold or disposed of by virtue of any judgment; * * * nor shall the husband and wife be ejected from or disposed of such real estate by virtue of any such judgment," prevents the purchaser at such sale from acquiring possession during life of the wife. The case of *Butler v. Rosenblath*, 42 N. J. Eq. 651 (9 Atl. Rep. 695; 59 Am. Rep. 52), which is followed in the case reported rests upon the theory that any other holding would cause such estates to operate as a fraud upon creditors; and in the opinion the court say: "At common law, the husband, during the joint lives, could for his own benefit take all the profits of the lands, and could mortgage and convey an estate to continue during the joint lives, but could not prejudice the right of the wife to take the estate in case she survived him. This has since 1846, been the accepted rule in this State. *Den v. Gardner*, Spen. 556; *Washburn v. Burns*, 5 Vr. 18. In virtue of the married relation the husband took possession and deprived the wife of the enjoyment of her estate or interest in the lands during their joint lives. In my opinion, the object and effect of the Married Woman's Act is to extinguish this right, which the husband had at common law to appropriate to his own use during the life of the wife, her estate in lands or real estate thus held, and to enable her to possess and enjoy it as fully as if she were a single woman. There is nothing in this legislation which is intended to affect or which does affect the estate which the husband takes in his own right, or which can operate to withhold that estate from the husband's creditors. The entire estate

during the joint lives of the husband and wife, having before the statute been subject to execution for the husband's debt, it was the purpose of the statute to save the wife's right from the operation of that rule. There is nothing in the law to justify the inference that the husband's right is to be shielded from the pursuit of creditors. Any device of this character for the protection of the husband's property from his creditors is unknown to the common law, and so contrary to public policy that it ought not to be engrafted upon our system of laws by the interpretation of this statute, unless the intent to do so is clearly expressed. Such a claim cannot be rested upon the ground that the wife is seised under the common-law rule, of an indivisible entirety, and that she is entitled to the possession of the whole with her husband. As has been shown, she was not at common law, as against her husband's grantee or creditor, entitled during the joint lives to the possession of the estate or any part of it. Her right of survivorship only was secure against the husband's appropriation. It seems impossible to maintain the wife's right to the possession of the whole upon the idea that she has an indivisible entirety, without adhering strictly to the doctrine of unity between husband and wife as recognized in the common law. If that doctrine is in no respect modified by the statute, then the common law rule, that the husband may dispose of the estate during the joint lives, must still prevail, and the wife will derive no benefit through this legislation, where the estate is by entirety."

The reasons for the contrary rule that the rents and profits follow the nature of the estate and can neither be disposed of nor charged except by the joint act of both husband and wife, are ably stated in the case of *McCurdy v. Canning*, 64 Pa. 39, in the following language: "If the husband might convey or mortgage it for the period of his own life, it would seem to follow, necessarily, that it might be taken in execution and sold by the sheriff for the same period, and that the purchaser of such an interest would be entitled to recover the possession during the life of the husband by an action of ejectment. But just here the act of 11th April, 1848, interposes an insuperable bar to such a result, declaring that 'every species and description of property, of whatever name or kind, which may accrue to any married woman during coverture, by will, descent, deed of conveyance, or otherwise, shall be owned, used and enjoyed by such married woman as her own separate property, and shall not be subject to levy and execution for the debts or liabilities of her husband; nor shall such property be sold, conveyed, mortgaged, or transferred, or in any manner incumbered by her husband, without her written consent first had and obtained, and duly acknowledged, etc.' The case, therefore, stands thus: Here is a married woman, who is neither a joint tenant or tenant in common with the husband, but who is seised of the whole estate, and with him entitled to possession of the whole. If a purchaser of the husband's interest may be put into possession with her, what follows? This: 1st. You have destroyed her estate and turned her entirety into a joint tenancy, or tenancy in common. 2d. You have deprived her altogether of the possession, because it is not in the nature of things that she can enjoy actual possession with a stranger as she did with her husband. 3d. You

have taken away her property without her consent, and destroyed her rights, which were protected by the act of April 11th, 1848. She was entitled to possession of the whole with her husband. You propose to give possession of the whole with a stranger, a possession which she cannot, and which he probably would not enjoy. If it should be answered that the property may be rented, and a moiety of the rents and profits may be paid to her, that is only to say that you may deprive her of her estate, and give her another of inferior value, a substitution which you have no right to propose. The words of the act of 1848 are of so comprehensive a character, and its purpose to protect every possible interest of the wife is so plain, that we cannot, by any possible construction consistent with the object of the legislature and the language which they have used, except this interest from its protection. These considerations lead us to the conclusion that one who, without the consent of the wife, purchases the husband's interest in real estate in which both husband and wife are seised of the entirety, and to the possession of the whole of which she is entitled equally with him, does not acquire, during the wife's life any right to the possession, either jointly with her or to her entire exclusion. Practically these two propositions are not alternatives, but the same, for we can as easily marry her to a stranger as marry her possession to his without destroying her estate."

In Michigan it is held that a joint mortgage executed by the husband and wife upon an estate held by them as tenants in the entirety, given to secure a loan to the husband, is valid as against the wife. *People's Bldg. & L. Ass'n v. Billing*, 104 Mich. 186 (62 N. W. Rep. 373); but her mortgage alone to secure his debt is void. *Naylor v. Minock*, 96 Mich. 182 (55 N. W. Rep. 664; 35 Am. St. Rep. 595). In Indiana the joint mortgage of the estate to secure the husband's debt is void. *Wilson v. Logue*, 131 Ind. 191 (30 N. E. Rep. 1079; 31 Am. St. Rep. 426); *Dodge v. Kinzy*, 101 Ind. 102; *McCormick Harvesting Mach. Co. v. Scovell*, 111 Ind. 551 (13 N. E. Rep. 58); *Crooks v. Kennett*, 111 Ind. 347 (12 N. E. Rep. 715); *Stewart v. Babbs*, 120 Ind. 568 (22 N. E. Rep. 770). These decisions rest upon the ground that such an instrument amounts to a contract of suretyship as to the wife which is prohibited by the statute, (2 Ballards' Annual, § 393); and the court holds that a mortgage on such an estate to secure the debt of the wife or a debt for the benefit of the common property will be upheld. *McLead v. Aetna Life Ins. Co.*, 107 Ind. 394 (8 N. E. Rep. 230); *McCoy v. Barnes*, 136 Ind. 378 (36 N. E. Rep. 134). Where a husband and wife, tenants by entirety, mortgage and warrant the land to secure the husband's debt, the mortgagee believing the title to be in the husband, and then convey the land to a third person who reconveys it to the husband, who afterwards by a similar process conveys it to the husband and wife as tenants by the entirety, it is held that want of title in the husband at the time of the execution of the mortgage is cured by the subsequent vesting of the title in him alone and the rights of the mortgagee are not affected by the subsequent conveyance. *Thalls v. Smith*, 139 Ind. 496 (39 N. E. Rep. 154).

For an extended and exhaustive consideration of the subject of

Estates by entireties, see 1 Ballards' Annual §§ 297-241; 30 L. R. A. 305-335, notes; 18 Am. Dec. 377-388, notes.

EPITOME OF CASES.

Sec. 367. Antenuptial contracts and marriage settlements. Marriage in an antenuptial contract is a valuable consideration, and such contract cannot be impeached by existing creditors as fraudulent unless it be shown that both parties thereto participated therein, or had notice of fraudulent intent. *Boggess v. Richards' Adm'r*, 39 W. Va. 567 (20 S. E. Rep. 599; 45 Am. St. Rep. 938). An antenuptial contract executed in a foreign land, in the absence of an express stipulation to that effect, can not control the rights of parties in real estate subsequently acquired in this country. *Long v. Hess*, 154 Ill. 482 (40 N. E. Rep. 335; 45 Am St. Rep. 143; 27 L. R. A. 791). This case contains an elaborate discussion of the principle stated and cites in support of its holding: Story, Conf. Laws, § 184; *Fuss v. Fuss*, 24 Wis. 256; *Castro v. Illies*, 22 Tex. 479 (73 Am. Dec. 277).

Sec. 368. Contracts and conveyances between. A conveyance directly from a husband to his wife, although void at common law, may be sustained in equity, there being a valid consideration and no fraud appearing. *Ogden v. Ogden*, 60 Ark. 70 (28 S. W. Rep. 796; 46 Am. St. Rep. 151); *Wanser v. Lucas*, 44 Neb. 759 (62 N. W. Rep. 1108); *Cosner v. McCrum*, 40 W. Va. 339 (21 S. E. Rep. 739). Miss. Code, §§ 2293, 2294, applied — conveyance between husband and wife — necessity of recording. *Underwood v. Ainsworth*, 72 Miss. 328 (18 So. Rep. 379). Under Minn. Gen. Stat., 1894, § 5534, contracts and powers of attorney executed between husband and wife relative to the real estate of either of them are invalid and without force. *Luce v. Reed*, Minn. (65 N. W. Rep. 91).

Sec. 369. Conveyance to husband and wife — Creation of joint tenancy. Although the common law rule of estates by entireties prevails in Indiana, it is held in that state that a conveyance to husband and wife "in joint tenancy, their heirs and assigns, forever," creates a joint tenancy under Rev.

Stat., 1894, § 8341, providing that a conveyance to two or more will create a joint tenancy where "it shall manifestly appear, from the tenor of the instrument, that it was intended to create an estate in joint tenancy." *Wilken v. Young*, Ind. (41 N. E. Rep. 68). Citing, *Thornburg v. Wiggins*, 185 Ind. 178 (84 N. E. Rep. 999; 41 Am. St. Rep. 422; 22 L. R. A. 42).

Sec. 370. Estates by entireties. The common law rule of estates by entireties prevails in Missouri. *Bains v. Bullock*, 129 Mo. 117 (81 S. W. Rep. 842); and in Tennessee. *Cole Mfg. Co. v. Collier*, 95 Tenn. 115 (81 S. W. Rep. 1000; 49 Am. St. Rep. 921; 80 L. R. A. 815). Title acquired by husband and wife by descent does not create an estate by entirety. *Brown v. Baraboo*, 90 Wis. 151 (62 N. W. Rep. 921). A conveyance to a husband and wife creates an estate by entirety although it contains a provision as to whom the property shall go at her death in case the wife survives the husband. *Cole Mfg. Co. v. Collier*, 95 Tenn. 115 (81 S. W. Rep. 1000; 49 Am. St. Rep. 921; 80 L. R. A. 815). Although in Pennsylvania it is held that at common law a conveyance to a husband and wife cannot make them tenants in common, yet in a recent case it is held that a mortgage may be assigned to a husband and wife so as to make each of them the owner in severalty of one half of it. *In re Young's Estate*, 166 Pa. 645 (81 Atl. Rep. 873). Where the statute (Mo. Rev. Stat. 1889, §§ 6864, 6869) gives a married woman power to sue alone for her separate property, a wife may maintain an action against third parties to recover possession of an estate held by her and her husband as tenants by entireties. *Bains v. Bullock*, 129 Mo. 117 (81 S. W. Rep. 842). A conveyance of the estate by the husband alone during coverture, is void. *Gray v. Bailey*, 117 N. C. 439 (28 S. E. Rep. 818). As to the incumbrance of the estate see case reported at the beginning of this chapter.

Sec. 371. Inchoate interests. A wife may assert her statutory inchoate interest in land purchased by her husband, but which he has caused to be conveyed to another as a mere nominal trustee, the fee being vested in him by Ind. Rev. Stat. 1894, § 8408, which provides that "a conveyance or de-

vise of lands to a trustee whose title is nominal only, and who has no power of disposition or management of such lands, is void as to the trustee, and shall be deemed a direct conveyance or devise to the beneficiary." *Stroup v. Stroup*, 140 Ind. 179 (39 N. E. Rep. 864; 27 L. R. A. 523). In Kansas it is held that a husband holding land under a contract of sale cannot make an enforceable assignment of such contract except his wife join with him in the same. Kan. Gen. Stat. 1889, Par. 2599, applied. *Union Pac. Ry. Co. v. Barnard & Leas Mfg. Co.*, 1 Kan. App. 23 (41 Pac. Rep. 201). It is held that where a husband alone executes a deed of assignment for the benefit of creditors, including real estate, which had been previously mortgaged by himself and wife, the title to one-third of such land remains in the wife, subject to the mortgage, which vests upon a sale under foreclosure. *Chase v. Van Meter*, 140 Ind. 321 (39 N. E. Rep. 455). Ind. Rev. Stat. 1894, § 2669, construed and applied—rights of wife as to inchoate interest in case of judicial sale of husband's property. *Currier v. Elliott*, 141 Ind. 394 (39 N. E. Rep. 554; 50 Am. St. Rep. 337).

Sec. 372. Action by wife concerning inchoate interest. A wife who has an inchoate interest in land may sue alone to set aside a deed thereof executed by her husband and one fraudulently personating her. *Clifford v. Kampfe*, 147 N. Y. 383 (42 N. E. Rep. 1). The court say: "The Revised Statutes provide that 'a widow shall be endowed of the third part of all the lands whereof her husband was seized of an estate of inheritance at any time during the marriage.' 1 Rev. Stat. p. 740, § 1. Dower accrues to the widow, and not to the wife; and until she becomes a widow her right is inchoate and contingent. Her claim can only materialize on the death of her husband and her survival. Being inchoate and contingent her interest does not amount to an estate or title, and yet she has an interest which attaches to the land as soon as there is a concurrence of marriage and seisin. 4 Kent Com. 50. The right of a dowress to her dower 'is not only a legal right, and so adjudged at law, but it is a moral right, to be provided for and have a maintenance and sustenance out of her husband's estate to live upon. She is, therefore, in the care of the law, and a favorite of the law.' 1

Story, Equity, § 629. The inchoate right of dower is a valuable, subsisting, separate, and distinct interest, which is entitled to protection, and for which the wife may maintain a separate action. *Simar v. Canady*, 58 N. Y. 298-305 (18 Am. Rep. 523); *Mills v. Van Voorhies*, 20 N. Y. 412; *Jackson v. Edwards*, 7 Paige 408; *Madigan v. Walsh*, 22 Wis. 501; *Burns v. Lynde*, 6 Allen 805; *Davis v. Wetherell*, 13 Allen 60 (90 Am. Dec. 177); *Petty v. Petty*, 4 B. Mon. 215 (89 Am. Dec. 501); *Babcock v. Babcock*, 58 How. Prac. 97; *Taggart v. Rogers*, 49 Hun. 265 (1 N. Y. Supp. 900). The action may not be, strictly speaking, one to remove a cloud upon title, for the inchoate dowress is not the owner of the title. But she has an inchoate interest which attaches to the land, and this she may protect in an action similar and in analogy to one to remove a cloud upon title. Equity is not limited to actions to remove clouds upon title, but reaches out to protect the rights of persons where they are threatened. It will restore property rights where fraud has intervened, and will annul contracts if public policy requires."

Sec. 373. Effect of divorce on real property rights. A divorced wife has no interest in the lands of her late husband. *Winch v. Bolton*, Ia. (68 N. W. Rep. 330). A divorce from bed and board does not deprive the wife of her rights in her husband's estate in the event of her surviving him. *Howell v. Thompson*, 95 Tenn. 396 (32 S. W. Rep. 309). A divorce granted to husband for a cause which does not render the marriage void from the beginning does not terminate his estate by the curtesy initiate. *Meacham v. Bunting*, 156 Ill. 586 (41 N. E. Rep. 175; 47 Am. St. Rep. 239). In Indiana it is held that a court has no power in a divorce proceeding to make a division of land held by the parties as tenants by entireties. *Alexander v. Alexander*, 140 Ind. 560 (40 N. E. Rep. 55). A void divorce granted to a wife in another state will not be given effect, on the theory that she is estopped, so as to relieve her husband's land in a suit between him and a third person from her inchoate dower right, especially where the question of dower was reserved in the decree of divorce. *McCreery v. Davis*, 44 S. C. 195 (22 S. E. Rep. 178; 51 Am. St. Rep. 794; 28 L. R. A. 655).

Where a party voluntarily accepts the privileges, benefits and fruits of a void judgment of divorce, he will be estopped from thereafter claiming the invalidity of such a decree for the purpose of asserting title to the property of a deceased companion. *Marvin v. Foster*, 61 Minn. 154 (63 N. W. Rep. 484). An agreement between husband and wife in regard to the division of their property which is executed pending a divorce proceeding and has for its consideration the promise of a husband to withdraw his counter charges, and make no defense, is contrary to public policy and void, and is not binding upon the court in making a division of the property. *Loveren v. Loveren*, 106 Cal. 509 (39 Pac. Rep. 801). Under Wis. Rev. Stat., § 2364, providing that upon divorce, a court may divide a husband's estate and so much of that "of the wife as shall have been derived from the husband," it is held that lands acquired from the profits of farming by the husband and wife together, on lands purchased with money derived from the sale of the husband's property, title to which was taken in the wife's name, are subject to equitable division. *Gallagher v. Gallagher*, 89 Wis. 461 (61 N. W. Rep. 1104).

Sec. 374. Miscellaneous notes. The presumption that where land is conveyed to a wife and paid for by the husband is intended as a gift, may be overcome by proof that the money was advanced by the husband as a loan to the wife. *Bennet v. Finnegan*, N. J. Eq. (33 Atl. Rep. 401). Where the wife acts as the agent of the husband he is bound by the transaction although it is different from what he thought it was. *Corbit v. Kimball*, 107 Cal. 665 (40 Pac. Rep. 1029). La. Rev. Civ. Code, Arts. 1502, 1749, 1750, construed and applied—donations of property between husband and wife—revocation. *Lavedan v. Jenkins*, 47 La. 725 (17 So. Rep. 256).

IMPROVEMENTS.

EPITOME OF CASES.

Sec. 375. Occupying claimants. An occupant making valuable and lasting improvements is entitled to recover the amount the real estate is increased in value by reason of such improvements, and not the cost of making the same. *Lothrop v. Michelson*, 44 Neb. 633 (63 N. W. Rep. 28). In a recent case the supreme court of Georgia say: "One who enters upon land under a conveyance from one not in possession, and, so far as appears, not having any color of title, enters and improves the premises at his peril; and the true owner is under no obligations to account to him for taxes paid, or for the cost of improvement over and above the mesne profits accruing from the land during the period of his occupation." *Tripp v. Fausett*, 94 Ga. 330 (21 S. E. Rep. 572). A person who pays taxes upon land prior to the time when he becomes an occupant thereof under the occupying claimant's law is not entitled to a lien therefor upon such land by reason of his subsequent *bona fide* occupation of the premises under color of title. Minn. Gen. Stat. 1894, § 5850 (Gen. Stat. 1878, Ch. 75, § 16), construed and applied. *Pfefferle v. Wieland*, 60 Minn. 328 (62 N. W. Rep. 396). In considering N. C. Code, § 473, which provides that one against whom a judgment for the recovery of land is rendered "may at any time before the execution of such judgment," petition for an assessment of the value of improvements made by him, it is held that such a judgment is "executed" when the plaintiff is put in possession and the execution returned, although the damages adjudged have not been paid. *Boyer v. Garner*, 116 N. C. 125 (21 S. E. Rep. 180). S. C. Rev. Stat., § 1957, permitting a tenant to make claim for improvements in an answer to an action against him for the land, is merely supplemental to § 1952, allowing one to recover improvements

in a separate action after ejectment has been rendered against him for the land. *Salinas v. C. Aultman & Co.*, S. C.

(22 S. E. Rep. 889). The statute of limitations relating to the foreclosure of tax liens is no bar to the recovery of taxes under the provisions of the occupying claimant's act. Neb. Comp. Stat., Ch. 63, § 1, construed. *Lothrop v. Michelson*, 44 Neb. 633 (63 N. W. Rep. 28). Under Neb. Comp. Stat., Ch. 63, § 5, appraisers appointed to determine the value of improvements must do so from a view of the premises. They have no right to take the testimony of witnesses. *Lothrop v. Michelson*, 44 Neb. 633 (63 N. W. Rep. 28).

In a recent case of *Hentig v. Redden*, 1 Kan. App. 163 (41 Pac. Rep. 1054), the court of appeals of Kansas say: "In an adjustment of the rights of parties under the occupying claimant's law, the following general rules should be observed as nearly as possible: (1) In assessing the value of lasting and valuable improvements, the jury should consider and find only the added value which the improvements so made give to the land at the time the premises are viewed, or when the successful claimant obtained possession. (2) Damages for waste should be assessed with reference to the condition of the premises at the time they came into possession of the defendant, or into the possession of those through whom he claims. (3) The net annual value of the profits charged against the occupying claimant should be estimated upon the use of the land without the improvements, for which compensation must be made. (4) The occupying claimant should have credit for only such portion of the taxes paid by him during his occupancy as were paid upon the land without his improvements." In support of the third rule stated the following cases are cited: *Elliott v. Armstrong*, 4 Blackf. 421; *Pacquette v. Pickness*, 19 Wis. 221; *Dungan v. Von Phul*, 8 Iowa 268; *Deen v. Feely*, 69 Ga. 822; *Haskins v. Spiller*, 8 Dana 573; *Pugh v. Bell*, 2 T. B. Mon. 125 (15 Am. Dec. 142); *Oil Co. v. Henshaw*, 89 Ala. 448 (7 South. 760); *Sarbach v. Newell*, 28 Kan. 642. The defendant in an action of ejectment who is defeated in his claim of title to real estate, and who is entitled to the benefit of the occupying claimant's law for his lasting and valuable improvements, is liable, under that law, for only the value of the rents and

profits which he may have received from the land, without his improvements. When a supersedeas bond is executed by sureties on behalf of the defendant in such an action, conditioned for the payment by him of the value of the use and occupation of the real estate, pending an appeal to the supreme court on a question of taxes, the sureties are liable on the bond only for the value of the use and occupation of the land, without the improvements of their principle, when, during the time of such use and occupation, there has been no assessment or payment of the value of the improvements, and proceedings under the occupying claimant's law had not been delayed or prevented by the defendant or his sureties. *Hentig v. Collins*, 1 Kan. App. 173 (41 Pac. Rep. 1057).

Sec. 376. Improvements by purchasers and mortgagees. Where a donee of land enters into possession thereof and makes improvements thereon in good faith, for the purpose of making it a home, he is entitled to set off against the demand for rent in a suit by the donor to revoke the gift, the enhanced value of the land by reason of the improvements. *Bourne v. Odams*, Ky. (32 S. W. Rep. 398). One who takes a conveyance of land in violation of his trust relation with the grantor cannot recover the value of improvements upon the setting aside of the deed. *McParland v. Larkin*, 155 Ill. 84 (39 N. E. Rep. 609). S. C. Rev. Stat., 1893, § 1952, construed and applied — claim for improvements by purchaser — sufficiency of complaint. *Tumbleston v. Rumph*, 43 S. C. 275 (21 S. E. Rep. 84). A mortgagee in possession without right cannot recover for improvements. *Malone v. Roy*, 107 Cal. 518 (40 Pac. Rep. 1040). Where an absolute deed is adjudged to be a mortgage the rights of the grantee thereunder to claim for improvements must be determined as a mortgagee and not as an owner. *Bateman v. Raymond*, 15 Mont. 439 (39 Pac. Rep. 520).

Sec. 377. Improvements by life tenant. Improvements made by a life tenant in the mistaken belief that she held the fee cannot be charged on the estate in remainder. *Nineteenth & Jefferson St. Presbyterian Church v. Fithian*, Ky. (29 S. W. Rep. 143). Under Wis. Rev. Stat., § 3096, it is held that the grantee of a life tenant by quitclaim

deed, cannot, in an action of ejectment, counterclaim for the value of improvements made, and taxes paid, while holding under such deed, as against the owner of the fee. *Falk v. Marsh*, 88 Wis. 680 (61 N. W. Rep. 287):

Sec. 378. Improvements by cotenants. Permanent improvements made by one coparcener, without request or agreement of others, are not chargeable to the others personally or upon their shares in the land; but, if made by their request or agreement, they are a debt upon them, and a lien upon their share in the land. One joint tenant, tenant in common, or coparcener can compel others to contribute to make necessary repairs to a mill or house, after request to assist and refusal. But this compulsion is as to future repairs, not those already made by one of the co-owners. This compulsion only applies to mills and houses, not to fences or other repairs to other properties. *Ward v. Ward's Heirs*, 40 W. Va. 611 (21 S. E. Rep. 746). In ejectment by one of two tenants in common against the other, who is in possession, defendant may be reimbursed for half the money paid by him, while in possession, on account of mortgages, taxes and interests thereon, and for half the value of repairs and improvements made by him. *Stewart v. Stewart*, 90 Wis. 516 (68 N. W. Rep. 886; 48 Am. St. Rep. 949). In partition the tenant who has made permanent improvements should be allotted that portion upon which such improvements are situated. *Dohoney v. Bell*, Ky. (80 S. W. Rep. 400).

Sec. 379. Miscellaneous notes. In the absence of a stipulation to the contrary, improvements made by a mortgagor go with the land. *Ivy v. Yancey*, 129 Mo. 501 (31 S. W. Rep. 937). The right to the use and possession of improvements made by a husband and wife upon land belonging to another does not constitute an interest in real estate, and a husband may sell the same without the wife joining in the conveyance. *Fowler v. Burke*, 13 Wash. 13 (42 Pac. Rep. 624.)

INFANTS AND INSANE PERSONS.

EPITOME OF CASES.

Sec. 380. Contracts with and conveyances by. The executed contracts of infants are voidable, and not void. *Gillenwater v. Campbell*, 142 Ind. 529 (41 N. E. Rep. 1041); *Shipley v. Bunn*, 125 Mo. 445 (28 S. W. Rep. 754). It is held that privies in blood may avoid the voidable contracts of infants and persons of unsound mind. *Gillenwater v. Campbell*, 142 Ind. 529 (41 N. E. Rep. 1041). Infant beneficiaries of a trust are not bound by contracts entered into between the trustee and an adult beneficiary. *Saunders v. Richard*, 85 Fla. 28 (16 So. Rep. 679). One who enters into contract relations with an insane person cannot question the capacity of such person to contract. *McWilliams v. Doran*, 103 Mich. 588 (61 N. W. Rep. 881). Where a person has been duly adjudged insane, but no guardian of her person and estate has been appointed by the probate court, and where such person, after having been committed to the insane asylum is discharged in an improved condition, and afterwards entirely recovers her reason, it is held that a contract entered into by her more than seven years after such adjudication of insanity, and after such entire recovery of her reason, is valid, without any adjudication by the probate court that such person has been restored to reason. *Topeka W. Sup. Co. v. Root*, 56 Kan. 187 (42 Pac. Rep. 715). Where a statute requires the wife to join in the conveyance of the homestead in order to pass any title, if she be insane at the time she signs and acknowledges the deed it is void for all purposes. The certificate of acknowledgment is not conclusive of her capacity. *Thompson v. New Eng. Mort. Sec. Co.*, Ala. (18 So. Rep. 315). A deed to his homestead made by an insane person and his wife, after he has been duly adjudged insane, and placed under guardianship, and a record

thereof duly made in the probate court, while he is out on a temporary leave of absence, after having been confined in the insane asylum, is void, and conveys no title to the purchaser. A mortgagee of the grantee in such deed, having actual notice of such insanity and such adjudication by the probate court, acquires no lien on the land. A mortgage on the homestead of an insane person, executed by his wife and guardian, without any order of the probate court is absolutely void. *New England L. & T. Co. v. Spitler*, 54 Kan. 560 (38 Pac. Rep. 799). In Michigan it is held that the deed of an insane person who has not been adjudged insane is not void but voidable only. And such deed must be avoided by a proceeding in equity. *Moran v. Moran*, Mich. (68 N. W. Rep. 989). In Indiana since April 18, 1866, an infant wife of an adult husband has been empowered by the statute to join with him in the conveyance of his real estate in the same manner as she would be if over twenty-one years of age. *Kenedy v. Hudkins*, 140 Ind. 570 (40 N. E. Rep. 52).

Sec. 381. Ratification of voidable contracts. The deed of an infant is fully ratified by the execution of a new deed upon arriving at maturity. *Cox v. McGowan*, 116 N. C. 181 (21 S. E. Rep. 108). Continuing to retain the proceeds of the transaction after majority is a ratification. *American F. L. M. Co. v. Dykes*, Ala. (18 So. Rep. 292). Minors may be bound by a parol partition of their land where after reaching majority and knowing the circumstances of the partition they retain possession and exercise acts of ownership over the property. *Whittemore v. Cope*, 11 Utah 844 (40 Pac. Rep. 256). Where a proceeding for the sale of an infant's lands is irregular, but not void, it may be ratified by the infant on becoming of full age, and it is held that the receipt of the balance of the purchase money may amount to such ratification. *Smith v. Gray*, 116 N. C. 811 (21 S. E. Rep. 200).

Sec. 382. Disaffirmance — Return of consideration. In Missouri it is held that an infant during his minority cannot disaffirm his deed nor recover possession of the land merely because of his infancy. *Shipley v. Bunn*, 125 Mo. 445 (28 S. W. Rep. 754). In Tennessee it is held that when the disabilities of infancy and coverture occur at the time of the exe-

cution of the deed or mortgage, then the right to disaffirm continues until both disabilities are removed without regard to length of time which may elapse between the date of the instrument and the freeing of the grantor from these disabilities; and where the grantor dies before these disabilities are removed her heirs may disaffirm in the same manner as she could if alive. *Walton v. Gains*, 94 Tenn. 420 (29 S. W. Rep. 458). Indiana Rev. Stat., 1894, § 8864, provides that an infant married woman cannot disaffirm a conveyance of land in which her husband of full age has joined without restoring the consideration. Under this statute it is held that a mortgage is a conveyance within its meaning, that while such infant cannot disaffirm a mortgage given for borrowed money she can disaffirm the notes secured thereby so as to escape personal liability. *United States Sav. F. & Inv. Co. v. Harris*, 142 Ind. 226 (40 N. E. Rep. 1072; 41 N. E. Rep. 451). Under Ind. Rev. Stat. 1894, §§ 8864, 8865, it is held that an infant married woman is not required upon rescission of the contract for the sale of land to return the consideration, unless her husband being of full age joined in the conveyance or she was guilty of false representations as to her age. *Gillenwater v. Campbell*, 142 Ind. 529 (41 N. E. Rep. 1041). An infant remainderman who knowingly accepts his part of the proceeds of a void sale of his land by the life tenant cannot recover the land unless he return the consideration. *Waters v. Lyon*, 141 Ind. 170 (40 N. E. Rep. 662).

Sec 383. Setting aside deed of insane person—Presumptions as to sanity and burden of proof. In an action to set aside a deed on account of the grantor's insanity the general rule prevails, that the presumption is of sanity and the burden of proving insanity rests upon the party alleging it. But, if insanity not connected with or traceable to a cause in its nature temporary—general or confirmed insanity—be shown, the presumption is of its continuance; and the burden of removing the presumption devolves on the party affirming the validity of an act done after the time the insanity is shown to have existed. *Pike v. Pike*, 104 Ala. 642 (16 So. Rep. 689). Citing, *Johnson v. Armstrong*, 97 Ala. 731 (12 So. Rep. 72); *O'Donnell v. Rodiger*, 76 Ala. 222 (52 Am. Rep.

322); *Saxon v. Whitaker*, 80 Ala. 287; *Rawdon v. Rawdon*, 28 Ala. 565; *Attorney General v. Parnther*, 3 Brown, Ch. 441; *Smith v. Tebbits*, L. R. 1 Prob. & Div. 398; *Hix v. Whettemore*, 4 Metc. (Mass.) 545; *Clark v. Fisher*, 1 Paige, 171 (19 Am. Dec. 402); *Harden v. Hayes*, 9 Pa. St. 151; *Turner v. Rusk*, 53 Md. 65. But where general, confirmed derangement is shown, the effect is to invert the order of proof and presumption. The burden is cast upon the one claiming under the deed to show that at the execution of the conveyance there was, as it is termed, a "lucid interval," an intermission of the derangement, a restoration to the grantor of his faculties, enabling him to comprehend intelligently the nature and character of the transaction in which he was engaged. The evidence must be addressed to the time of the execution of the conveyance. Evidence that prior thereto, at times subsequent to the existence of the general derangement (if such evidence may be fairly collected from the record), the grantor was sane, or had intermissions of the derangement, are unavailing, and cannot be made the basis of an inference or presumption that he was sane at the execution of the conveyance. *Pike v. Pike*, 104 Ala. 642 (16 So. Rep. 689).

Sec. 384. Judicial proceedings affecting their interests. In order to divest the title of an infant by judicial sale the statutory provisions governing such proceedings should be strictly complied with. *Isert v. Davis*, Ky. (32 S. W. Rep. 594). In Missouri if the judgment be for the infant, it will not be set aside because his appearance was by an attorney and not by a guardian *ad litem*. *Cochran v. Thomas*, 181 Mo. 258 (33 S. W. Rep. 6). It is held by a divided court that where the guardian of infants having an interest in realty is personally served with process in partition proceedings and answers and is represented by counsel throughout such proceedings the infants are bound thereby. *Kromer v. Friday*, 10 Wash. St. 621 (39 Pac. Rep. 229; 32 L. R. A. 671). Not a guardian by nature, but only a guardian appointed, who has given bond as and when required by law, is entitled to the possession, care, and management of his ward's estate. An infant who has no such guardian who has given bond may, for damage done to his real estate, sue by next friend. *Mc-*

Dodrill v. Pardee & Curtain L. Co., 40 W. Va. 564 (21 S. E. Rep. 878).

Sec. 385. Courts of equity—Power over infants' lands. A court of equity has no power to directly or indirectly confirm a private sale by an unauthorized person of an infant's lands. *Kinslow v. Grove*, Ky. (82 S. W. Rep. 988). In a recent case the authorities are collated and reviewed, and it is held that such courts have no inherent power to direct the sale or incumbrance of the real property of infants. *Losey v. Stanley*, 147 N. Y. 560 (42 N. E. Rep. 8). In Alabama it is held that a court of equity may decree a sale of infants' lands, not only for their maintenance or to remove incumbrances or satisfy charges resting thereon, but also for the investment of the proceeds of the sale and general advantage of the infant; but such sale should not be ordered unless some necessity therefor be shown on behalf of the infant. *Gassenheimer v. Gassenheimer*, Ala. (18 So. Rep. 520). In New Mexico it is held that whenever the property of infants consists of real or personal estate the legal title to which is in trustees, the chancellor, as the general guardian and protector of the rights of all infants, may authorize such a disposition thereof as he, in the exercise of a sound legal discretion, may deem most beneficial for the infants. A court of chancery has power to sell equitable interests of infants, and such power is inherent and independent of statutory authority. In a case where it is proper for the court to exercise this equitable power, the fact that the decree recites that the proceeding is upon the consent of infants, who have no power to give such consent, does not invalidate the decree. *Bent v. Miranda*, N. M. (42 Pac. Rep. 91.)

Sec. 386. Trust property—Decree of sale against infant trustee. Del. Code, 1874, Chap. 95, § 13, provides that "any person under the age of twenty-one years, having real estate in trust for others, may, by direction of the court of chancery, given upon hearing of all the parties concerned on the petition of those for whom such infant is trustee, or of the guardian of such infant, convey and assure such real estate in such manner as said court shall direct to any other person; and such conveyance shall be as good and effective in

law as if the said infant was of full age; and such infant may be compelled to execute such order, in like manner as trustees of full age are compellable to convey or assure trust estates." Construing and applying this statute, it is held that the court may decree the sale of lands held in trust by an infant without providing for his having a day in court after he becomes of age and that such decree is as effectual as one against persons *sui juris*. *Bradford v. Robinson*, 7 Houst. (Del.) 29 (30 Atl. Rep. 670).

Sec. 387. Statute of limitations—As to when it runs against infants. Time runs against the equitable estate of minors if the legal estate be in one competent to assert their rights. Where a father not being the legal guardian holds the legal title in trust for a minor son and during the minority of the son, conveys such land, as his own property, to another, who takes without actual notice of the trust, and the trust estate be until the son attained his majority, represented by the father, then, inasmuch as the trust itself becomes executed by the majority of the son, the interest of the son is thus at all times represented by a person competent to sue, and prescription runs in favor of the purchaser, continuously, from the beginning of the possession under the conveyance from the father; and if the purchaser, in good faith, goes into possession thereunder, and continues for a term of seven years before the institution of a suit by the son for the recovery of the property thus conveyed, he acquires, as against the son, a good title by prescription. *McCrary v. Clements*, 95 Ga. 778 (22 S. E. Rep. 675).

INSURANCE.

EPITOME OF CASES.

Sec. 388. Ownership of the property insured. A policy providing that the insured shall be the sole and unconditional owner, is not rendered void by the fact that a portion

of the purchase money remained unpaid and the contract of purchase contained a provision of forfeiture for nonpayment. *Carey v. Allemania F. Ins. Co.*, 171 Pa. St. 204 (88 Atl. Rep. 185). It seems that where a policy is issued to one who holds the legal title to real estate, where no inquiries are made as to whether any other person is interested in such property, and no representations are made by the insured, further than that he is the owner of the premises, it is not a defense by the insurance company, in an action on such policy, that the insured, though holding the legal title to the premises, was a mere trustee for an undisclosed beneficiary. *Rochester L. & B. Co. v. Liberty Ins. Co.*, 44 Neb. 537 (62 N. W. Rep. 877; 48 Am. St. Rep. 745). An insurer cannot avoid liability on a policy taken out by a trustee for the interest of his *cestui que trust* because he could not have enforced the trust, where the trustee of his own will performs the trust. A policy taken out by a trustee, and providing for its forfeiture in case of any change in the title of the property without the consent of the insurer, is not avoided by a conveyance by the trustee to the *cestui que trust*. *Rhode Island Underwriters' Assn. v. Monarch*, Ky. (32 S. W. Rep. 959).

Sec. 389. Fraud or mistake of agent. In a recent case the supreme court of Pennsylvania say: "The fraud or mistake of an insurance agent within the scope of his authority will not enable his principal to avoid a contract of insurance to the injury of the insured, who acted in good faith; and the fraud or mistake of the agent may be proved by parol evidence, notwithstanding it is provided in the policy that the description of the property shall be a part of the contract and a warranty by the insured. This is clear upon principle, and it is abundantly sustained by authority." *Dowling v. Merchants' Ins. Co.*, 168 Pa. St. 234 (81 Atl. Rep. 1087). Citing, *Smith v. Ins. Co.*, 89 Pa. St. 287; *Eilenberger v. Ins. Co.*, Id. 464; *Insurance Co. v. Cusick*, 109 Pa. St. 157; *Kister v. Ins. Co.*, 128 Pa. St. 553 (18 Atl. Rep. 447; 15 Am. St. Rep. 696; 5 L. R. A. 646); *Meyers v. Insurance Co.*, 156 Pa. St. 420 (27 Atl. Rep. 39).

Sec. 390. Forfeiture—Vacancy of buildings. Forfeiture clauses in an insurance policy may be waived by the

conduct of the company or its duly authorized agent. *Morlock Ins. Co. v. Pankey*, 91 Va. 259 (21 S. E. Rep. 487). A house built for dwelling purposes but used by its owner for cooking and general work in connection with an adjacent house where the owner with his family eat and sleep, is not vacant or unoccupied. *Dwelling House Ins. Co. v. Osborn*, 1 Kan. App. 197 (40 Pac. Rep. 1099). The temporary absence of a tenant does not render the house vacant. *Burlington Ins. Co. v. Lowery*, 61 Ark. 108 (32 S. W. Rep. 388). Where at the time of the insurance the property is vacant to the knowledge of the insurer or its agent, in a subsequent action on the policy, the company cannot avail itself of a clause in the policy which renders it void upon the property being vacant. *Rochester L. & B. Co. v. Liberty Ins. Co.*, 44 Neb. 537 (62 N. W. Rep. 877; 48 Am. St. Rep. 745).

Sec. 391. Change in title. A condition in a policy rendering it void in case of a sale or transfer in whole or in part may be waived without a written endorsement on the policy. *McFetridge v. Amer. F. Ins. Co.*, 90 Wis. 138 (62 N. W. Rep. 938). A voluntary assignment for the benefit of creditors conveying real estate to the assignee is such a change of title as will render void an insurance policy containing the provision that the same shall be void "if the property or any interest therein be sold or transferred." *Orr v. Hanover F. Ins. Co.*, 158 Ill. 149 (41 N. E. Rep. 854, 49 Am. St. Rep. 146). The change, by order of court, of the legal trustees having possession and control of the property, is not such a change of ownership as will invalidate a policy containing the usual provision that it shall become void upon a change of title or ownership. *Georgia Home Ins. Co. v. Bartlett*, 91 Va. 305 (21 S. E. Rep. 476; 50 Am. St. Rep. 882). Where a fire insurance policy provides that it shall be void if any change took place in the interest of the insured whether by voluntary act of the insured or otherwise, it is held that an executory agreement to convey the insured premises under which the vendee took possession and paid a part of the purchase price is a breach of the condition and renders the policy void. *Gibb v. Fire Ins. Co.*, 59 Minn. 267 (61 N. W. Rep. 137; 50 Am. St. Rep. 405). The same rule would obtain where a

mortgage was executed upon the insured property with the loss made "payable to the mortgagee as his interest may appear," endorsed on the policy, and the mortgage subsequently foreclosed, the premises sold to the mortgagee who received a deed therefor. *McKinney v. Western Assur. Co.*, Ky. (80 S. W. Rep. 1004).

Sec. 392. Change in title—Incumbrances. It is held that where the insured was not questioned as to incumbrances on his property and did not intentionally conceal the facts, the existence of a mortgage thereon does not invalidate the policy. *Insurance Co. of N. A. v. Bachler*, 44 Neb. 549 (62 N. W. Rep. 911). A policy of insurance containing the condition, "This policy shall be void and of no effect, unless consent in writing is indorsed by the company hereon, in each of the following cases, viz.: (1) If the assured is not the sole and unconditional owner of the property, or if the property, or any part thereof, be or become mortgaged, or otherwise incumbered," — is rendered void if the property insured is encumbered, of which the insurer has no knowledge, and to which it has not assented, at the time the policy is issued. An agreement in a lease of real property that, on failure to pay the quarterly rent covenanted to be paid by the lessee, the buildings, improvements, and other property placed upon said real property by the lessee "are subject and held liable to restraint and sale under warrant, in like manner as personal property for said rent," etc.; and that said building, improvements and other property may be followed and distrained, or the material thereof — constitutes an incumbrance in the nature of a mortgage upon such buildings and improvements. The fact that no rent was due and unpaid at the time the policy was issued is not material, as such an agreement covers all rent that might become due during the continuance of the lease — the last installment, as well as the first — and the incumbrance upon the property continues until the termination of the lease. *Peet v. Dakota F. & M. Ins. Co.*, S. Dak. (64 N. W. Rep. 206).

Sec. 393. Change in title—Making of a mortgage. A policy of insurance containing a provision that if any change take place in the title, interest, or possession of the property

insured, by sale, transfer, or conveyance, without the consent of the insurer, the policy shall become void, is not invalidated by the making of a mortgage. The words "title" or "possession," as here used, mean an actual change in law and equity, and the word "interest" means a change in the insurable interest of the owner of the property, neither of which is affected by the execution of a mortgage. *Sun Fire Office v. Clark*, 53 O. St. 414 (42 N. E. Rep. 248). The court say: "It seems well settled in this state and elsewhere that the making of a mortgage does not violate a provision in a policy of insurance that any change in the title, interest, or possession of the assured in the property, without the assent of the insurer, shall avoid the policy. The mortgage being simply a security for the debt, is extinguished by its payment, without any reconveyance. The mortgage of itself does not make the mortgagee a freeholder, and a judgment recovered against him does not become a lien on the land, nor is it liable to the dower rights of his wife. It has none of the incidents of a legal or equitable title."

Sec. 394. Change in title—Deed to secure debts. Georgia Code, § 1969, provides in substance, that a deed to secure debts shall operate as an absolute conveyance with a right reserved only in the vendor to have the property reconveyed to him upon payment of the debt secured. Under this statute it is held that a deed to secure debts is an alienation of the property, operates to pass the title to the property conveyed, and is not a mere incumbrance thereon. Hence where a policy of insurance covering a building on the premises is issued, containing a condition that the policy should be void "if the property should be sold, or the title or possession of the property, or any part thereof, transferred or changed, whether by legal process, judicial decree, conveyance, or otherwise;" and where, pending such insurance, the holder of the policy thus conveys the property insured—the policy is thereby rendered void, and in case of loss the assured cannot maintain thereon an action against the insurer. *Phoenix Ins. Co. v. Asberry*, 95 Ga. 792 (22 S. E. Rep. 717).

Sec. 395. Insurance for benefit of another—Mortgages. A third person to whom a policy is made payable "as

his interests may appear" need not then have an insurable interest in the property; but in order for such person to maintain an action on the policy he must be entitled to the entire insurance. *Donaldson v. Sun Mut. Ins. Co.*, 95 Tenn. 280 (82 S. W. Rep. 251). Where an insurance policy issued to the owner is made payable to the assignee of the mortgagee (naming the assignee), "as interest may appear" in case the assignee assigns his interest after the loss, the owner and such third party may maintain an action on the policy. *Ermentrout v. Amer. F. Ins. Co.*, 60 Minn. 418 (62 N. W. Rep. 548). Where property is insured for the benefit of the mortgagee, as its interest may appear and the mortgage has been duly foreclosed prior to the time of such insurance and the premium paid by the mortgagee, but the time for redemption not having expired until a period subsequent to the insurance, it is held that non-redemption from the mortgage sale by the owner of the premises did not work an alienation of the property, so as to defeat the policy, but that an action might be maintained in case of loss without notice to the insurance company of such non-redemption, and a notation thereof made on the policy, notwithstanding the policy provided that the mortgagee should notify the company of any change of ownership in the property insured, and that it be so noted on the policy. *Washburn Mill Co. v. Fire Ass'n*, 60 Minn. 63 (61 N. W. Rep. 828; 51 Am. St. Rep. 500).

IRRIGATION.

EPITOME OF CASES.

Sec. 396. Right to appropriate water—Priorities. A riparian owner does not lose his right to the use of water by mere nonuser, as against a lower appropriator. *Hargrave v. Cook*, 108 Cal. 72 (41 Pac. Rep. 18; 30 L. R. A. 390). A prior appropriator has no right to affect an exclusive appropriation of the water of a stream, to the injury of a subsequent appropriator, by selling the water he does not need for his

own use to another. *Creek v. Bozeman Water Works Co.*, 15 Mont. 121 (38 Pac. Rep. 459). A prior appropriator cannot maintain an injunction against a subsequent upper appropriator to compel him to return the water into the natural channel where it appears that instead of doing this he has returned the water into the ditch of the lower appropriator who gets the same use and benefit of it that he would were it turned into the original channel. *Austin v. Chandler*, Ariz. (42 Pac. Rep. 483). Where the first appropriator files no plat or declaration of intention to extend his appropriation his rights under a second appropriation are subject to the rights of others acquired in the interim, where it appears that such enlargement was not prosecuted within a reasonable time. *Taughenbaugh v. Clark*, 6 Colo. App. 285 (40 Pac. Rep. 153). A party appropriating who has lost his rights by failure to apply the water to a beneficial use may reacquire them by a subsequent reentry for that purpose if intervening rights have not attached. *Beaver Brook Res. Co. v. St. Vrain Res. Co.*, 6 Colo. App. 180 (40 Pac. Rep. 1066). Where the title to water has been obtained by prior appropriation, a decree enjoining one from wrongly diverting it is not erroneous merely because the party so enjoined owns the land through which the water naturally flows. *Ronnow v. Delmue*, Nev. (41 Pac. Rep. 1074). Particular fact case in which the question of priorities as between appropriators is determined. *Wold v. May*, 10 Wash. St. 157 (38 Pac. Rep. 875).

Sec. 397. Extent of appropriation—Abandonment. In the recent case of *Wimer v. Simmons*, 27 Ore. 1 (39 Pac. Rep. 6; 50 Am. St. Rep. 685), the supreme court of Oregon say: "It is the policy of the law that water of a stream shall be appropriated to the extent only that it is put to or designed for some useful or beneficial purpose. This is the measure of the appropriation. The entire appropriation may not be utilized at once for the purposes designed. In such case a reasonable time is allowed within which to make the application to such purposes, and the surroundings and circumstances of each particular case are elements for consideration in determining what is a reasonable time within which to complete

and fix the extent of the appropriation. *Hindman v. Rizor*, 21 Ore. 112 (27 Pac. Rep. 18); *Simmons v. Winters*, 21 Ore. 85 (27 Pac. Rep. 7; 28 Am. St. Rep. 727); *Low v. Rizor*, 25 Ore. 556 (37 Pac. Rep. 82); *Cole v. Logan*, 24 Ore. 804 (33 Pac. Rep. 568); *Sieber v. Frink*, 7 Colo. 154 (2 Pac. Rep. 901). A prior appropriator, having the exclusive right to the use of part or all the water of a stream, may lose the same by abandonment. When abandoned the water becomes *publici juris*, and subsequent appropriators are entitled to it, according to their respective priorities. The abandonment may be express and immediate, as by the intentional act of the owner and possessor of the right, or it may be implied from his neglect, failure of application to the purpose designed within a reasonable time, nonuser, and the like. Kin. Irr., § 258; Black's Pom. Water Rights, § 96. The right of a prior appropriator may also be lost by the adverse possession of another. Nonuser by the owner of the right and adverse user of it by another for a time equal to the period fixed as the limitation of actions for the recovery of real property is necessary in this state to work a forfeiture through this method. Id., § 98; *Dodge v. Marden*, 7 Ore. 458; *Water Co. v. Crary*, 25 Cal. 508.

The party claiming an abandonment has the burden of proving it, and must establish the fact by clear and unequivocal evidence. *Beaver Brook Res. Co. v. St. Vrain Res. Co.*, 6 Colo. App. 130 (40 Pac. Rep. 1066). Where a mere appropriator of water abandons its use it becomes subject to a new appropriation. *Smith v. Green*, 109 Cal. 228 (41 Pac. Rep. 1022). Particular facts held sufficient to constitute an abandonment of water rights. *New Mercer Ditch Co. v. Armstrong*, 21 Colo. 857 (40 Pac. Rep. 989). Particular facts held insufficient to show an abandonment of one's rights in an irrigation ditch constructed jointly with another. *Moss v. Rose*, 27 Ore. 595 (41 Pac. Rep. 666; 50 Am. St. Rep. 748.)

Sec. 398. Appropriation of water on public lands. In the case of *Utt v. Frey*, 106 Cal. 892 (39 Pac. Rep. 807), the supreme court of California say: "One who, in California, desires to appropriate the water of a stream upon the vacant and unappropriated public lands of the United States

for a useful purpose may do so by the construction of a ditch or other medium of conduit, and actually appropriating the water and conducting it to some point where it can be utilized in fulfillment of such useful purpose; and by so doing he acquires, as against all subsequent appropriators and riparian proprietors acquiring title from the United States subsequent to such appropriation, the right to the quantity of water thus appropriated, and an easement of right of way into and over the public land traversed by his ditch or conduit so constructed and used for such purpose. If one animated by a like desire to appropriate water under like circumstances finds a ditch already constructed to hand, takes peaceable possession thereof, and appropriates the water for a like or similar useful purpose, he thereby acquires a like right as against all the world, except the true owner, or those holding under or through him. If nature or art has furnished the medium of appropriation, he may avail himself of the gift or labor without being held liable to those having no interest therein, and in no wise connected therewith. To the owner of a ditch thus possessed and used such appropriator must account until his possession and user ripens into a title by prescription or adverse user. His right in such case will depend for priority, as against other appropriators of water from the same stream, upon the date of his possession and appropriation, and not upon the date of the original construction of the ditch and appropriation by some other person under whom he does not hold, and between whom and himself there is no privity of estate. His appropriation in such a case is a new and independent one, and must stand or fall upon its own merits."

The right of prior appropriation of water from streams on public lands for mining and irrigation purposes existed as a part of the laws and customs of that portion of the state of Washington east of the Cascade mountains, and was taken notice of judicially by the courts, prior to the Act Cong. July 26, 1866; that act did not create the right but simply recognized existing rights. *Isaacs v. Barber*, 10 Wash. St. 124 (38 Pac. Rep. 871; 45 Am. St. Rep. 772; 30 L. R. A. 665). See Public Lands.

Sec. 399. Acquisition of water rights by prescription. In order to establish a right by prescription to the use of water claimed by another, the use and enjoyment must have been uninterrupted, adverse, and under a claim of right, and with the knowledge of the owner, *Wimer v. Simmons*, 27 Ore. 1 (39 Pac. Rep. 6; 50 Am. St. Rep. 685). *Authers v. Bryant*, Nev. (38 Pac. Rep. 489). In the last case the court say: "As said in the case of *Land & Water Co. v. Hancock*, 85 Cal. 226 (24 Pac. Rep. 645): 'This right becomes fixed only after five years' adverse enjoyment; and, to have been adverse, it must have been asserted under claim of title, with knowledge and acquiescence of the persons having the prior right, and must have been uninterrupted. In order to constitute a right by prescription, there must have been such an invasion of the rights of the party against whom it is claimed that he would have ground of action against the intruder. To be adverse, it must be accompanied by all the elements required to make out an adverse possession; the possession must be by actual occupation, open, notorious, and not clandestine; it must be hostile to the other's title; it must be held under claim of title, exclusive of any other, as one's own; it must be continuous and uninterrupted for the period of five years.' In *Cave v. Crafts*, 53 Cal. 138, the court uses this language: 'The use,' says Wood in his law of Nuisance, 'must also be open and as of right, and also peaceable; for if there is any act done by other owners that operates as an interruption, however slight, it prevents the acquisition of the right by such use.'" The use of water by a license or by permission of the prior appropriator is not hostile, and cannot support a claim of right by prescription or adverse user. *Wimer v. Simmons*, 27 Ore. 1 (39 Pac. Rep. 6; 50 Am. St. Rep. 685). After water has flowed past a riparian owner his right to use it ceases, and his acquiescence in its subsequent diversion for a useful purpose by another cannot create a prescriptive right in such person. *Hargrave v. Cook*, 108 Cal. 72 (41 Pac. Rep. 18; 30 L. R. A. 390).

Sec. 400. Conveyance of water rights. A right of way for conducting water over land is property and may be the subject of a grant. *Fudicar v. East Riverside Irr. Dist.*,

109 Cal. 29 (41 Pac. Rep. 1024); *Childs v. Whitman*, 7 Colo. App. 117 (42 Pac. Rep. 601). In the last case the court say: "It is well established that an interest in a ditch is property, which may be transferred or conveyed, subject to the same limitations and restrictions which attend a conveyance of real property. A conveyance of land without mention of a water right cannot be taken to transfer an interest in a ditch, although the water carried may have been used upon the land. In this state it is regarded as an independent right, which may be the subject of a sale and conveyance, but a technical transfer is essential to vest in the transferee a title to the water. *Burnham v. Freeman*, 11 Colo. 601 (19 Pac. Rep. 761); *Strickler v. City of Colorado Springs*, 16 Colo. 61 (26 Pac. Rep. 818; 25 Am. St. Rep. 245); *Bloom v. West*, 3 Colo. App. 212 (32 Pac. Rep. 846); *Smith v. O'Hara*, 43 Cal. 871; *Hayes v. Fine*, 91 Cal. 891 (27 Pac. Rep. 772)." The right to use a certain proportion of the water of a stream acquired by a lower owner by appropriation may be transferred by him to an upper owner. *Middle Creek Ditch Co. v. Henry*, 15 Mont. 558 (39 Pac. Rep. 1054). A contract conveying water rights is valid and binding, as between the parties, without being acknowledged or recorded; and a subsequent appropriator is not a purchaser, within the meaning of Mont. Gen. Laws, div. 5, § 260, making unrecorded conveyances void as against a subsequent *bona fide purchaser* whose conveyance is first duly recorded. *Middle Creek Ditch Co. v. Henry*, 15 Mont. 558 (39 Pac. Rep. 1054). See opinion for extensive consideration of this subject. Where a deed conveying land and water rights reserves a "one-half interest in a certain ditch" the grantor is entitled to the use of one-half the water appropriated by the ditch, whether the entire water right is appurtenant to the land conveyed or not. *Arnett v. Linhart*, 21 Colo. 188 (40 Pac. Rep. 855). Where the owner of land had begun the construction of an irrigation canal but had not completed the same, his vendee of a portion of the land does not acquire a right to the use of such canal as an appurtenance to the land conveyed in the absence of some contract to that effect. *Crawford v. Minnesota & M. L. & Imp. Co.*, 15 Mont. 158 (38 Pac. Rep. 718). The conveyance of an irrigation ditch unconnected with the stream from which the

water is to be obtained, and without sufficient fall to carry the water onto the land intended to be irrigated, conveys no right to the water in such stream. *Wold v. May*, 10 Wash. St. 157 (38 Pac. Rep. 875). For construction of a stipulation in deeds of water rights by an irrigation company whereby the grantees are to become the owners of the canal when a certain amount of water rights have been sold and paid for, see *La Junta & Lamar C. Co. v. Hess*, 6 Colo. App. 497 (42 Pac. Rep. 50).

Sec. 401. Reservoirs—Storage of water. The owner of land has no right to construct a reservoir for the storage of water to be disposed of for irrigation purposes unless he appropriates the water in accordance with the provisions of the constitution and statutes. *Beaver Brook Res. Co. v. St. Vrain Res. Co.*, 6 Colo. App. 180 (40 Pac. Rep. 1066). The court say: "The common-law right, by virtue of the fee in the land, only extends to the use of the water upon the land owned, and the water must be returned to its natural channel, within his boundaries, without serious diminution in quantity, for the benefit of riparian proprietors below. Gould, Waters, § 213 *et seq.*; Ang. Water Courses, §§ 90-96; *Elliott v. Railroad*, 10 Cush. 198; *Gillett v. Johnson*, 80 Conn. 180; *Ewing v. Colquhoun*, 2 App. Cas. 839; *Sandwich v. Railroad Co.*, 10 Ch. Div. 707; *Garwood v. Railroad Co.*, 88 N. Y. 400 (88 Am. Rep. 452). It will be readily seen that the right to construct reservoirs for the storage of water, to control, transport and dispose of it for irrigation, cannot be based upon the common-law right pertaining to the ownership of land, and such use, being at variance with and in derogation of the common-law of riparian ownership, can only be predicated upon special constitutional and statutory provisions permitting such use, and the ownership of the land is no factor, only in so far as it obviates the necessity of the exercise of the law of eminent domain."

Sec. 402. Miscellaneous notes. One who is denied his right to a portion of the water in an irrigation ditch does not thereby acquire the right to construct a new ditch and appropriate all the water. *Arnett v. Linhart*, 21 Colo. 188 (40 Pac. Rep. 855). A mandatory injunction will not lie to

compel an irrigation company to perform its contract to furnish water where the party asking it has an adequate remedy at law. *Fulton Irr. D. Co. v. Twombly*, 6 Colo. App. 554 (42 Pac. Rep. 253). Where the terms of a contract to furnish water for irrigation purposes are ambiguous parol evidence of the surrounding circumstances and the intent of the parties is admissible to aid in the construction. *Balfour v. Fresno C. & Irr. Co.*, 141 Cal. 221 (41 Pac. Rep. 876). Where an irrigating ditch is constructed and owned by two landowners in common one of them is not relieved from the obligation to keep the same in repair because he does not use the ditch. *Moss v. Rose*, 27 Ore. 595 (41 Pac. Rep. 666; 50 Am. St. Rep. 743). A decree fixing the rights of parties to the use of water for irrigation purposes should be as certain as the use of language can make it. *Authers v. Bryant*, Nev. (38 Pac. Rep. 439). After water has been lawfully appropriated for some beneficial purpose, the place or character of its use may be changed, though such change injuriously affects one who uses the water after it passes from the control of the prior claimant. *Wimer v. Simmons*, 27 Ore. 1 (39 Pac. Rep. 6; 50 Am. St. Rep. 685). See, *Hargrave v. Cook*, 108 Cal. 72 (41 Pac. Rep. 18; 30 L. R. A. 390). For an extended discussion of the rights of the city of Los Angeles, California, in the water of Los Angeles river, see, *Vernon Irrigating Co. v. Los Angeles*, 106 Cal. 237 (39 Pac. Rep. 762). Particular fact case as to the right to maintain an irrigation ditch. *Joseph v. Ager*, 108 Cal. 517 (41 Pac. Rep. 422).

Sec. 403. Miscellaneous notes—Statutes construed. Under California Civ. Code, § 1411, declaring that an appropriation of water must be for some useful purpose, and that, when the appropriator ceases to use it for such a purpose, the right ceases, not only the water rights, but rights of way for ditches, given by Rev. St. U. S., §§ 2339, 2340, over land which at the time of the appropriation belonged to the public, are lost by nonuser for five years — the period for obtaining prescriptive title, or losing a prescriptive right by nonuser. *Smith v. Hawkins*, 110 Cal. 122 (42 Pac. Rep. 453). Lands of a city generally exempt from taxation are subjected to an assessment for irrigation purposes under Cal. Act. March 7,

1887. *San Diego v. Linda Vesta Irr. Co.*, 108 Cal. 189 (41 Pac. Rep. 291). Neither a married woman who has only a wife's interest in community lands nor one holding a certificate of purchase of school lands, upon which he has paid twenty per cent of the price, are "freeholders owning lands" within the meaning of § 2 of the Wright Act of 1887, requiring a petition to organize an irrigation district to be signed by fifty such freeholders. *Directors of Fallbrook Irr. Dist. v. Abila*, 106 Cal. 855 (39 Pac. Rep. 794). For an extended consideration of Cal. Stat., 1889, pp. 212, 213, and Stat. 1891, pp. 143, 147, concerning the establishing of irrigation districts and regulating the proceedings of directors and supervisors thereof, see *Cullen v. Glendora Water Co.*, Cal. (39 Pac. Rep. 769). Cal. Civ. Code, § 1412 applied — change of point of diversion. *Hargrave v. Cook*, 108 Cal. 72 (41 Pac. Rep. 18; 30 L. R. A. 890). Cal. Civ. Code, § 1422, applied — rights of riparian proprietors. *Hargrave v. Cook*, 108 Cal. 72 (41 Pac. Rep. 18; 30 L. R. A. 890). Cal. Stat., 1887, p. 82, construed and applied — issue of irrigation bonds — election. *Directors of Fallbrook Irr. Dist. v. Abila*, 106 Cal. 265 (39 Pac. Rep. 793). Colo. Gen. Stat., 1883, § 1716, *et seq.*, construed and applied — enlargement of private ditch. *Function Creek & N. D. & I. Ditch Co. v. Durango*, 21 Colo. 194 (40 Pac. Rep. 856). Colo. Acts, 1879 & 1881, applied — effect of decree determining priorities as to water rights. *New Mercer Ditch Co. v. Armstrong*, 21 Colo. 357 (40 Pac. Rep. 989). A statute (Neb. Act Mar. 27, 1889) providing for the condemnation of property for the construction of a system of irrigation for agricultural and manufacturing purposes is constitutional. *Paxton & H. Irr. C. & L. Co. v. Farmers' & M. Irr. & L. Co.*, 45 Neb. 884 (64 N. W. Rep. 343; 29 L. R. A. 853). See opinion for an elaborate construction of this statute.

JUDICIAL SALES.

EPITOME OF CASES.

Sec. 404. Power of officer—Sale in parcels or in solido. An officer in charge of process may postpone a sale, on his own motion, in case a gross and unnecessary sacrifice of property is threatened. *Roger & Baldwin H. Co. v. Cleveland Bldg. Co.*, Mo. (32 S. W. Rep. 1). An officer selling property under execution or a decree in equity can sell such property on such terms, and such terms only, as are provided by the decree and the law in force governing such sale, which is incorporated into and a part of such decree. He has no authority to sell on credit, or to accept in payment of the bid anything other than lawful money, unless otherwise expressly authorized by the terms of the decree or the law in force governing such sale. *Hooper v. Castetter*, 45 Neb. 67 (68 N. W. Rep. 135). Where two pieces of land are adjoining and used as one parcel they may be sold together. *Gage v. Sanborn*, Mich. (64 N. W. Rep. 82). In construing Hill's Ore. Code, § 292, which provides that the sale must be made in lots or parcels when a portion of the real estate to be sold is claimed by a third person who requests it to be sold separately, it is held that a party to the suit in which the judgment was rendered under which the sale has been made is a "third party" within the meaning of the statute. *Balfour v. Burnett*, 28 Ore. 72 (41 Pac. Rep. 1).

Sec. 405. Confirmation of Judicial sales. Sales of land by an executor or administrator, under decrees of a chancery court, are judicial sales, and are not complete until reported to and confirmed by the court; and the bidder at such sale is not a purchaser nor entitled to possession until such confirmation. *Maynard v. Cocke*, Miss. (18 So. Rep. 374). In Arkansas it is held that a guardian's sale passes no

title until it is confirmed, and that the statute of limitations does not begin to run in favor of the purchaser until that time. *Lumpkins v. Johnson*, 61 Ark. 80 (82 S. W. Rep. 65). Title to realty sold by an assignee in an insolvency proceeding does not pass until the sale is confirmed by the court. *Chase v. Van Meter*, 140 Ind. 821 (89 N. E. Rep. 455).

Sec. 406. Rights and liabilities of purchasers. A purchaser may refuse to complete his purchase on account of the existence of incumbrances on the property which were not known to him at the time of making the bid. *In re Box*, 11 Wash. St. 90 (89 Pac. Rep. 240). Equity will not relieve a purchaser from complying with the terms of the sale on account of defects of title of which he had notice at the time of the purchase. *Stewart v. Devries*, 81 Md. 525 (82 Atl. Rep. 285). One who is a purchaser at sales made under three different writs cannot refuse to comply with his bid when a valid and legal title is conveyed through the execution of one of the writs, because the sheriff in the execution of the other two writs may have departed from their terms. *Danneel v. Klein*, 47 La. 928 (17 So. Rep. 466). Where a commissioner appointed to make a sale is required to give a bond before receiving any money from the sale, a purchaser who pays money to such commissioner without his having given such bond, does so at his own risk; and this rule is not affected by the fact that the commissioner was the judgment creditor's attorney. *Shumate v. Williams*, Va. (22 S. E. Rep. 808). Mansf. Ark. Dig., §§ 8058, 8059, construed and applied—action against bidder for refusal to make payment and complete his purchase. *Harder v. Sayle-Stegall Comm. Co.*, 61 Ark. 66 (81 S. W. Rep. 979).

Sec. 407. Setting aside sale on account of fraudulent conduct of purchaser—Return of purchase price. Where one, by hiring purchasers to cease bidding, purchases property for a less price than it would otherwise have brought, he takes no title thereto as against the parties he has defrauded, and they may recover the property from him without repaying to him the purchase price, although it was used to discharge liens on the land, or any other money expended by him. *Gobel v. O'Connor*, 48 Neb. 49 (61 N. W. Rep. 181). The court

say: "The only remaining question is, will a court of equity order that appellant be repaid the purchase money which extinguished incumbrances upon the premises, existing prior to and at the time of the sale, and other expenditures made by him upon the property and its title? Is he entitled to any relief, or must it be denied him? He has invoked against the appellees the rule of equity that 'he who seeks equity must do equity.' We do not think he is in a position in this case to claim the benefit of the above rule. A maxim which we think more applicable to his position, as indicated by the facts and circumstances adduced at the trial of the case, is, 'He that hath committed iniquity shall not have equity' (Fran. Max. 8); and another that 'he who comes into a court of equity must come with clean hands.' These have a direct application to the facts of the present case. The appellant by his own fraudulent acts has placed himself in such a position that the court can afford him no relief. All these payments were made in pursuance of, and as a part and in completion of, the sale which was made to him, and which was fraudulent as to the rights of appellees because of his wrongful acts and practices at and during such sale; and his right to be reimbursed all payments and expenditures must arise out of the sale, which was tainted with his fraud and wrong, and void in consequence thereof, and his claim derived from such a source cannot be recognized in any court. To require the appellees to repay what has been paid out by appellant in this case would not be enforcing the rule that 'he who seeks equity must do equity.' 'The rule has no application to cases of actual fraud. It would be against good policy that it should, for it would act as an encouragement to unfair dealing. A man might gain, but he could not lose, by his frauds. If he succeeded, he would reap the fruits of knavery; but, if detected, he would be entitled to a return of his money, and moreover to be reimbursed to the value of his improvements.' *Gilbert v. Hoffman*, 2 Watts 66 (26 Am. Dec. 103). The sale to appellant was void because of his wrongful and fraudulent acts at the time of the sale, and he acquired no title as against appellees, and is not entitled to have money paid out by him refunded, and this last, not by way of punishment, and not that the court would help or desire to aid appellees beyond the demands of justice and

equity, but because by his own wrong the appellant has placed himself in such a position that the court is unable to grant him relief. *McCaskey v. Graff*, 23 Pa. St. 821 (72 Am. Dec. 836); *Gilbert v. Hoffman*, 2 Watts 68 (26 Am. Dec. 103); *Sands v. Godwise*, 4 Johns. 597; *Elam v. Donald*, 58 Tex. 816; *In re Hays' Estate*, 159 Pa. St. 881 (28 Atl. Rep. 158); *Sheld. Subr.*, § 44; *Devine v. Harkness*, 117 Ill. 145 (7 N. E. Rep. 52); *Guckenheimer v. Angevine*, 81 N. Y. 894; *Railroad Co. v. Soutter*, 13 Wall. 517; *Martin v. Hodge*, 47 Ark. 878 (1 S. W. Rep. 694; 58 Am. Rep. 763); *Johnson v. Moore*, 33 Kan. 90 (5 Pac. Rep. 406); *German Bank v. U. S.*, 13 Sup. Ct. 702; *Wilkinson v. Babbitt*, 4 Dill. 207, Fed. Cas. No. 17, 668; *Perkins v. Hall* 105 N. Y. 589 (12 N. E. Rep. 48); *Acker v. Hotchkiss*, 97 N. Y. 895.

Sec. 408. Inadequacy of price. Mere inadequacy of price where no fraud is claimed will not authorize the setting aside of a judicial sale. *Carver v. Spence*, 67 Vt. 563 (82 Atl. Rep. 493); unless the price is so inadequate as to shock the moral sense and outrage the conscience. *Corrigan v. Schmidt*, 126 Mo. 804 (28 S. W. Rep. 874). A sale otherwise fair and regular will not be set aside because the purchase price is somewhat less than the value of the property. *Thompson v. Ritchie*, 80 Md. 247 (80 Atl. Rep. 708); *Hollister v. Vanderlin*, 165 Pa. St. 248 (80 Atl. Rep. 1002); *Lepper v. Mooyer*, 82 Md. 649 (33 Atl. Rep. 263); *Fowler v. Krutz*, 54 Kan. 622 (38 Pac. Rep. 808); *Alms & Doepke Co. v. Gates*, Ky. (32 S. W. Rep. 1088). Inadequacy of price accompanied with other irregularities may be ground for setting aside a sale. *Rogers & Baldwin H. Co. v. Cleveland Bldg. Co.*, Mo. (32 S. W. Rep. 1); and great inadequacy of price is a circumstance which courts will always regard with suspicion, and in such case slight additional circumstances only are required to authorize the setting aside of the sale. *Fowler v. Krutz*, 54 Kan. 622 (38 Pac. Rep. 808). A sale will not be set aside for inadequacy of price unless there is some assurance that the property will bring a higher price at another sale. *Fidelity Ins. T. & S. D. Co., v. Byrnes*, 166 Pa. 496 (31 Atl. Rep. 255); *Cochrane v. Burton*, 105 Cal. 853 (38 Pac. Rep. 952). A sale of a debtor's rights appraised

at \$4,000 to his wife for \$2,700 will not be set aside, no fraud, mistake, or surprise appearing, it being apparent that persons declined to bid against the purchaser on account of sympathy. *Alms & Doepke Co. v. Gates*, Ky. (32 S. W. Rep. 1088). A partition sale of real estate valued at not less than \$8,000 for the sum of \$1,500 was set aside on account of gross inadequacy of price. *Johnson v. Avery*, 60 Minn. 262 (62 N. W. Rep. 283).

Sec. 409. Guardian Sales. Statutory proceedings to effect guardian's sales should be strictly pursued and the doctrine of *caveat emptor* applies to purchasers at such sales. Private sale is not allowed except where the order of the court specifically directs it. *Leuders v. Thomas*, 35 Fla. 518 (17 So. Rep. 633; 48 Am. St. Rep. 255). Where it appears from the records of a guardian's sale, complete and regular on their face, that each and all of the statutory requisites have been complied with, such records import unimpeachable verity, and the presumptions arising therefrom cannot be rebutted in a collateral proceeding by any evidence *dehors* the record. Minn. Gen. Stat. 1894, § 4612, construed. *Kurtz v. St. Paul & D. R. Co.*, 61 Minn. 18 (63 N. W. Rep. 1). Ala. Code, 1876, § 2785, regulating guardian's sales does not require that notice be given to the ward, or that a guardian *ad litem* be appointed for him, and where the necessary jurisdictional facts appear, the sale will not be set aside for a failure in these particulars. *Daughtry v. Thweatt*, Ala. (16 So. Rep. 920). Under the statutes of Texas (Rev. Stat. Art. 2515), the probate court may sell land situated in that state for the purpose of educating a non-resident minor. *Bouldin v. Miller*, 87 Tex. 359 (28 S. W. Rep. 940). Where, under the advice of a family meeting, duly held and homologated, certain immovable property of the minor, alleged to belong to him by the tutor, is exchanged for other property of the same kind, the judgment of the court authorizing and approving the exchange is conclusive between the tutor and the minor. The property exchanged for the minor's property becomes their property irrevocably, as against the tutor and those claiming through or by him and including creditors whose claims originated after the judgment. *Rawlins v. Giddens*, 46 La.

(17 So. Rep. 262). La. Civ. Code, Art. 222; Rev. Stat. § 2359, Act 1878, No. 25, applied—sale of child's property—family meeting. *Dauterive v. Shaw*, 47 La. 882 (17 So. Rep. 845).

Sec. 410. Miscellaneous notes. A sale under foreclosure by advertisement is not a judicial sale. *Hanna v. Chase*, 4 N. Dak. 851 (61 N. W. Rep. 18; 50 Am. St. Rep. 656). Where one authorizes an auctioneer by letter containing the cash deposit required by the notice of sale, to bid a certain price for lands to be offered at public auction and is not present at the sale and has no representative there, and is not known to the parties conducting the sale as being a responsible bidder he cannot afterward insist upon the acceptance of his bid. *Thompson v. Ritchie*, 80 Md. 247 (80 Atl. Rep. 708). It is no ground for setting aside a judicial sale that the movables attached to a plantation, which were about to be sold in block with it, under a seizure, should have been fraudulently undervalued in the separate appraisement of the land and the movables, made with the view to fix the pro rata of the proceeds of sale to be paid to the mortgage claim upon the land and to the privileged claim upon the movables. The relief of the privileged creditors upon the movables, if any they have, is limited to the setting aside of the fraudulent appraisement, and to a distribution of the price upon a new valuation. It is not a ground for setting aside a judicial sale that the writ under which the property was sold issued for a larger amount than was due, nor because, prior to the sale, the seizing creditor had consented, in the event of his purchasing the property, to make a subsequent disposition of it to a third person in the interest of the seized debtor. The subsequent disposition might be attacked, but the sale would stand, as the creditor, in seizing, selling and purchasing, would have only exercised a legal right. *Amato v. Ermann*, 47 La. 967 (17 So. Rep. 505). Ky. Civ. Code, § 491, applied—sale of land for reinvestment. *Luttrell v. Wells*, Ky. (80 S. W. Rep. 10).

LANDLORD AND TENANT.

EPITOME OF CASES.

Sec. 411. As to when the relation of landlord and tenant exists. A school teacher occupying a part of a school-house as a residence with the consent of the parties employing him does not thereby become their tenant. *School Dist. No. 11 v. Batsche*, Mich. (64 N. W. Rep. 196; 29 L. R. A. 576). One retaining possession of land after he has deeded it to his creditor to secure his debt is not a tenant of such vendee. *Ray v. Boyd*, 96 Ga. 808 (22 S. E. Rep. 916). Where a contract of sale between a vendor and vendee provides that upon the latter's failure to make payment of the purchase money at a certain time, he will pay certain rent notes, his failure to make such payments amounts to an election on his part to become the tenant of the vendor. *Block v. Smith*, 61 Ark. 266 (32 S. W. Rep. 1070). When a married woman rents a house and lot, and enters into possession of it with her husband, who resides with her, and he does not at once dissent and repudiate the contract, the lease inures to his benefit, and he becomes a tenant of the lessor. *Hagar v. Wikoff*, 2 Okla. 580 (39 Pac. Rep. 281). Particular facts held to create the relation of landlord and tenant. *Reddick v. Hutchinson*, 94 Ga. 675 (21 S. E. Rep. 712).

Sec. 412. Estoppel to deny title. A tenant is estopped to deny his landlord's title. *Hochenauer v. Hildebrant*, 6 Colo. App. 199 (40 Pac. Rep. 470); *Rakes v. Rustin L. M. & Mfg. Co.*, Va. (22 S. E. Rep. 498); *Pugh v. Davis*, 103 Ala. 316 (18 So. Rep. 9). The estoppel does not depend upon the validity of the landlord's title. *Hagar v. Wikoff*, 2 Okla. 580 (39 Pac. Rep. 281). One taking possession under a lease is estopped to deny the title of his landlord admitted by this act so long as he continues in possession

under the lease. *Kiernan v. Terry*, 26 Ore. 494 (88 Pac. Rep. 671); *Hamill v. Falconick*, 3 Okla. 223 (41 Pac. Rep. 189); *Pappe v. Trout*, 3 Okla. 260 (41 Pac. Rep. 897). One who takes possession of premises from another and contracts with him as "the owner thereof," and agrees to hold "as his tenant," is estopped to deny that such party has any title. *Ricketson v. Galligan*, 89 Wis. 894 (62 N. W. Rep. 87). A husband occupying property with his wife which she has leased is estopped to deny the landlord's title. *Hagar v. Wicoff*, 2 Okla. 580 (39 Pac. Rep. 281). A subtenant is estopped to deny the title of the one from whom he accepts his lease. *Lewis v. Brandle*, Mich. (64 N. W. Rep. 784). Where a debtor conveyed land to his creditor to secure the payment of the debt and took from him a lease, he was held estopped to deny the title of the creditor in an action to recover rent due under the lease. *Knowles v. Murphy*, 107 Cal. 107 (40 Pac. Rep. 111). A tenant in possession of real property, for the use of which he neither agrees to pay rent nor taxes, is not bound, merely because of such occupancy, to redeem the property from back taxes, nor is he estopped from afterwards buying in a tax title based on a tax sale made prior to his taking possession of the same. *Uhl v. Small*, 54 Kan. 651 (39 Pac. Rep. 178). A tenant is not estopped from showing that his landlord's title has expired and that he is in possession under a paramount title. *Moore v. Smead*, 89 Wis. 558 (62 N. W. Rep. 426). Citing, *England v. Slade*, 4 Term R. 682; *Doe v. Edwards*, 5 Barn. & Adol., 1065; *Doe v. Barton*, 11 Adol. & E. 307; *Nellis v. Lathrop*, 22 Wend. 121 (34 Am. Dec. 285); *Lamson v. Clarkson*, 118 Mass. 848 (18 Am. Rep. 498); *Elliott v. Smith*, 28 Pa. St. 181; *Smith v. Crossland*, 106 Pa. St. 418.

Sec. 413. Forfeiture and disclaimer. The clause of forfeiture or termination of the estate of the lessee is for the benefit of the lessor and no act of the lessee can work such forfeiture or termination without concurrence of the lessor and no stranger can enforce it. *Bartley v. Phillips*, 165 Pa. St. 325 (30 Atl. Rep. 842). Although a lease provides for the payment of rent in advance and for forfeiture in case of non-payment, a landlord who accepts a part payment in advance

waives his right to insist upon the forfeiture during the period covered by such part payment. *Barber v. Stone*, 104 Mich. 90 (62 N. W. Rep. 139). A landlord who accepts the payment of rent after the same is due, without objection, waives his right to insist upon a forfeiture of a privilege in the lease conditioned upon the prompt payment of rent. *Mack v. Dailey*, Vt. (80 Atl. Rep. 686). Where a lease provides that in case of failure to pay rent for more than a specified number of days the tenancy shall be at once, and without notice of any kind, determined; in case of such failure by the lessee, a re-entry or previous demand by the lessor is not necessary to complete the forfeiture. *Shanfelter v. Horner*, 81 Md. 621 (82 Atl. Rep. 184). A lease cannot be declared forfeited for the nonpayment of rent where time is not made the essence of the contract. *Lynch v. Versailles*, 165 Pa. St. 518 (80 Atl. Rep. 984). One who has come into the possession under another will not be permitted to set up an adverse holding without full notice of his disclaimer, but the fact of such notice may be proven by a preponderance of evidence. *Reusens v. Lawson*, 91 Va. 226 (21 S. E. Rep. 847).

Sec. 414. Tenancy at sufferance. Tenants at will of a tenant in curtesy become tenants at sufferance of the purchaser of the estate by curtesy. *Marster v. Cling*, 163 Mass. 477 (40 N. E. Rep. 768). One occupying property as an employee becomes a tenant at sufferance if the owner permits him to remain a sufficient length of time to imply an intentional acquiescence in the occupancy, although his previous holding was not that of a tenant, and a consent to the occupancy, either express or presumed from lapse of time, is not essential to create that relation. *School Dist. No. 11 v. Batsche*, Mich. (64 N. W. Rep. 196; 29 L. R. A. 576). In Pennsylvania a tenant holding over after the expiration of a lease for a definite time becomes a tenant at sufferance, and he is liable for rent. *Williams v. Ladew*, 171 Pa. 369 (83 Atl. Rep. 329).

Sec. 415. Tenancy from year to year. In Indiana, where a tenant under a lease for years holds over, and the landlord thereafter accepts or demands rent, a tenancy from year to year is created, which may be determined by ten days'

written notice to quit, in case of default in the payment of rent. *Kleespies v. McKenzie*, 12 Ind. App. 404 (40 N. E. Rep. 648). A statute (S. C. Rev. Stat. 1898, § 2149) which makes certain parol leases create estates at will only, does not prevent such an estate from being converted into a tenancy from year to year. *Hellams v. Patton*, 44 S. C. 454 (22 S. E. Rep. 608). Under How. Mich. Stat., vol. 2, § 5875, allowing an executor to lease the real estate of his testator "from year to year," and providing that such real estate may be turned over to the heirs or devisees on their showing that the same is not needed for the payment of debts, it is held that an executor's lease for two years is void as such, but creates a tenancy from year to year. *Grady v. Warrell*, Mich. (63 N. W. Rep. 204). Where a farm lease specified that the renting was "for one year," a subsequent stipulation therein that the lease was to continue as long as the parties should agree does not create a tenancy from year to year. *Dunphy v. Goodlander*, 12 Ind. App. 609 (40 N. E. Rep. 924).

Sec. 416. Holding over. The presumption that a holding over by a tenant creates a certain kind of tenancy may be rebutted by proof of a different agreement, or of facts inconsistent with the presumption. *Montgomery v. Willis*, 45 Neb. 434 (63 N. W. Rep. 794). Citing, *Shipman v. Mitchell*, 64 Tex. 174; *Williamson v. Paxton*, 18 Grat. 475; *Grant v. White*, 42 Mo. 285; *Secor v. Pestana*, 37 Ill. 525. In Illinois, where a tenant for a year or years holds over after the term expires, without any new agreement, the landlord, at his election, may treat such tenant as a trespasser, or as a tenant for another year upon the same terms as in the original lease; but no such right of election belongs to the tenant. *Condon v. Brockway*, 157 Ill. 90 (41 N. E. Rep. 634). Where, at the expiration of his tenancy, a tenant in the act of removing fails to do so on account of misrepresentations of the owner, but does remove as soon as he knows of their falsity, his holding over is not such as to create a tenancy for another term. *Montgomery and Hooker*, JJ., dissenting. *Campau v. Mitchell*, 103 Mich. 617 (61 N. W. Rep. 890). Where a tenant holds over he cannot defeat an action for rent by showing his failure to sign a new lease was occasioned by

his landlord's refusing to agree to make certain repairs which he desired. *Patterson v. Park*, 166 Pa. St. 25 (30 Atl. Rep. 1041). Where a tenant holds over after the expiration of his lease and the landlord accepts rent from him he then becomes a tenant from year to year. *Amsden v. Atwood*, 67 Vt. 289 (31 Atl. Rep. 448).

Sec. 417. Notice to quit. The right to a written notice terminating a tenancy may be waived. *Smith v. Snyder*, 168 Pa. 541 (32 Atl. Rep. 64). Mailing a notice to quit in a letter, in the absence of proof that the letter was stamped, does not constitute *prima facie* evidence of the service of the notice. *Bless v. Jenkins*, 129 Mo. 647 (31 S. W. Rep. 938). Citing, *Briggs v. Hervey*, 130 Mass. 187. A notice by a lessor that he intends to cancel the lease for non-payment of rent, under the provisions of the lease, may be withdrawn before the expiration of the time fixed. *Goldsboro Storage & W. H. Co. v. Duke*, 116 N. C. 202 (21 S. E. Rep. 178). A tenant holding under a lease for a definite period with an option of a further term for a number of years does not acquire any right to a notice to quit by giving notice to the landlord that he elects to renew the lease for a lesser number of years than the number specified in the lease. *Williams v. Mershon*, 57 N. J. L. 242 (30 Atl. Rep. 619). In a particular case it is held that a notice to quit to a subtenant may be given by parol. *Fratcher v. Smith*, 104 Mich. 537 (62 N. W. Rep. 832). One who occupies for many years a house built by him upon the land of another, under an agreement to remove it whenever requested to do so, is a tenant at will and is entitled to notice to quit. *Blanchard v. Bowers*, 67 Vt. 403 (31 Atl. Rep. 848). In order to terminate a lease from year to year, in South Carolina, it is necessary to give reasonable notice of such intention before the end of the calendar year, and the sufficiency of such notice is a question for the jury. *Jones v. Spartanburg Herald Co.*, 44 S. C. 526 (22 S. E. Rep. 731). Particular leases construed with reference to the necessity of notice to quit in order to terminate the tenancy. *Ashurst v. Eastern Pa. Photo. Co.*, 166 Pa. 357 (31 Atl. Rep. 116). Hill's Code, Vol. 2, § 549, subd. 3, applied—notice to quit. *Gilmore v. H. W. Baker Co.*, 12 Wash. St. 468 (41 Pac. Rep. 124).

Sec. 418. Surrender. There cannot be a complete surrender so long as subtenants are in possession. *Bless v. Jenkins*, 129 Mo. 647 (31 S. W. Rep. 938). To render a surrender complete it must be accepted by the lessor. *Ashurst v. Eastern Pa. Photo. Co.*, 166 Pa. 857 (31 Atl. Rep. 116); *Lane v. Nelson*, 167 Pa. 602 (31 Atl. Rep. 864). A landlord who accepts a surrender cannot thereafter hold the tenant liable for rent. *Schulenberg v. Uffelman*, Mich. (64 N. W. Rep. 460). A lessor who accepts a surrender is bound thereby although not made in strict conformity with the technical provisions of the lease. *Pendill v. Lucy Min. Co.*, Mich. (62 N. W. Rep. 1024); *Elgutter v. Drishaus*, 44 Neb. 878 (63 N. W. Rep. 19). An agent having authority to collect rent does not have an implied authority to accept a surrender. *Blake v. Dick*, 15 Mont. 286 (38 Pac. Rep. 1072; 48 Am. St. Rep. 671). Abandoning the premises and giving the key to the agent of the owner who subsequently delivered it to the owner, who subsequently offered the property for rent was held insufficient to establish a surrender. *Blake v. Dick*, 15 Mont. 286 (38 Pac. Rep. 1072; 48 Am. St. Rep. 671). The fact that a landlord offers for sale property which has been abandoned by his tenant and proposes to give immediate possession does not constitute an acceptance of the tenant's surrender. *Reeves v. McComeskey*, 168 Pa. 571 (32 Atl. Rep. 96). Where a tenant quit the premises and left the key with a neighbor for the lessor and the lessor afterward notified the tenant that he would hold him for the rent for the whole term unless the premises were re-rented, and thereupon placed the premises in the hands of a rental agent, it was held that such facts were insufficient to establish a surrender. *Lane v. Nelson*, 167 Pa. 602 (31 Atl. Rep. 864). Particular facts held sufficient to constitute a surrender. *Lafferty v. Hawes*, Minn. (65 N. W. Rep. 87). Where a lease gives the lessee the right to surrender his interest at any time, and such surrender is sought to be established by the lessee in pursuance to a parol arrangement with his lessor, the evidence establishing such arrangement must be clear, precise and undoubted. *Hooks v. Forst*, 165 Pa. St. 238 (30 Atl. Rep. 846). The surrender by a subtenant to the principal landlord does not affect the enforcement of a mortgage given by said subtenant

to the original lessee to secure the payment of rent. *Firth v. Rowe*, 53 N. J. Eq. 520 (82 Atl. Rep. 1064). The mortgagee of a leasehold estate may by his acts ratify the surrender of a lease by the lessee and the acceptance of a new lease in its stead. *Judik v. Crane*, 81 Md. 610 (82 Atl. Rep. 276).

Sec. 419. Surrender by operation of law—Statutes construed. The sale of his interest by one joint lessee to the other, followed by his abandonment of the premises upon the agreement of the lessor to release him and receive rent from the other lessee, was held not to be a surrender by operation of law within the meaning of N. H. Pub. Stat., ch. 187, § 12, providing that no estate or interest in land shall be surrendered except by a writing signed by the grantor or his attorney or by operation of law. *Felker v. Richardson*, N. H. (82 Atl. Rep. 830). The court say: "Precisely what is meant by a surrender by operation of law, and in what state of facts the law operates to effect a surrender, may not be fully settled, and for the disposition of the present question need not be determined. A surrender by agreement, whether express or implied, is the act, not of the law but of the parties. To constitute a surrender by operation of law, overt acts of both parties inconsistent with the continuance of the term are essential. Co. Litt. 388 a; Com. Dig. 'Surrender,' 2; 20 Vin. Abr. 'Surrender,' F; Broom, Leg. Max. 669, 670; Roberts, Frauds, 248-261; *Mollett v. Brayne*, 2 Camp. 103; *Thomas v. Cook*, 2 Barn. & Ald. 119; *Doe v. Johnston*, McClell. & Y. 141; *Johnstone v. Hudlestone*, 4 Barn. & C. 922; *Graham v. Whichelo*, 1 Crompt. & M. 187; *Walker v. Richardson*, 2 Mees. & W. 882; *Dodd v. Acklom*, 6 Man. & G. 672; *Lyon v. Reed*, 13 Mees. & W. 285, 305-310; *Nickells v. Atherstone*, 10 Q. B. 944; *McDonnell v. Pope*, 9 Hare 705; *Davison v. Gent*, 1 Hurl. & N. 744; *Phene v. Popplewell*, 12 C. B. (N. S.) 334; *Oastler v. Henderson*, 2 Q. B. Div. 575; 2 Smith, Lead. Cas. (4th Am. Ed.) 459 a-460; *Elliott v. Aiken*, 45 N. H. 30, 36; *Kendall v. Hill*, 64 N. H. 558 (15 Atl. Rep. 124); *Beall v. White*, 94 U. S. 882 (24 L. Ed. 178); *Randall v. Rich*, 11 Mass. 494; *Brewer v. Dyer*, 7 Cush. 337; *Talbot v. Whipple*, 14 Allen 177, 180, 181; *Amory v. Kannoffsky*, 117 Mass. 851 (19 Am. Rep. 416); *Hesseltine*

v. *Seavey*, 16 Me. 212; *Schieffelin v. Carpenter*, 15 Wend. 400; *Bedford v. Terhune*, 80 N. Y. 458 (86 Am. Dec. 894); *Coe v. Hobby*, 72 N. Y. 141 (28 Am. Rep. 120); *Smith v. Kerr*, 108 N. Y. 81 (15 N. E. Rep. 70; 2 Am. St. Rep. 862); *Bacon v. Brown*, 9 Conn. 884; *Strong v. Crosby*, 21 Conn. 898, 404, 405; *Patchin v. Dickerman*, 81 Vt. 666; *Browne*, St. Frauds, §§ 48-57." In construing a similar statute (Wis. Rev. Stat., § 2302), it is held that a surrender "by act or operation of law" does not arise where a lessee of a building removed his goods therefrom but retained the keys and actual possession of the lower floor, where the office was, under a verbal agreement that the lease was to terminate at a certain date to which rent was paid, but that the lessee could remain in the building until the same was rented. *Burnham v. O'Grady*, 90 Wis. 461 (63 N. W. Rep. 1049). When the question is whether a surrender of a lease has occurred by the operation of law, the statement of the landlord that he should look to the substituted tenant for a certain item of rent that would not be due from him as assignee, is competent evidence. *DeHart v. Creveling*, 57 N. J. L. 642 (32 Atl. Rep. 212).

Sec. 420. Wrongful eviction by the landlord. Where a landlord by his own act renders the premises filthy and uninhabitable, the tenant may treat it as an eviction and abandon them. *Sully v. Schmitt*, 147 N. Y. 248 (41 N. E. Rep. 514). The court say: "It is a long-established and perfectly familiar rule that a physical eviction is not necessary to exonerate the tenant from the payment of rent. The landlord's acts, though not amounting to a physical expulsion, may nevertheless be of so pronounced and offensive a character as to create a nuisance, which, by preventing the reasonable use by the tenant of the premises, would affect directly the consideration of the contract between them. *Dyett v. Pendleton*, 8 Cow. 727; *Edgerton v. Page*, 20 N. Y. 281; *Boreel v. Lawton*, 90 N. Y. 293 (48 Am. Rep. 170). The fact that the lessee is prevented from using the demised premises for the sale of intoxicating liquors, the purpose for which he leased them, on account of the subsequent erection of a school building by the city within a certain distance of the premises, does not constitute an eviction by the lessor. *Miller v. McGuire*, 18 R. I.

770 (30 Atl. Rep. 966). The court say: "In order to constitute an eviction which will operate either to annul the lease or as a suspension of rent, the act complained of must have been done by the landlord, or by his procurement, with the intention and effect of depriving the lessee of the use and enjoyment of the demised premises in whole or in part. In *Royce v. Guggenheim*, 106 Mass. 201 (8 Am. Rep. 322), Judge Gray adopts the following definition of an eviction from *Upton v. Townsend*, 17 C. B. 80: 'Chief Justice Jarvis said: "I think it may be taken to mean this—not a mere trespass and nothing more, but something of a grave and permanent character done by the landlord with the intention of depriving the tenant of the enjoyment of the demised premises." * * *

Mr. Justice Crowder said: "Eviction, properly so called, is a wrongful act of the landlord, which operates the expulsion or amotion of the tenant from the land." See, also, Tayl. Landl. & Ten. (8th Ed.) §§ 378-381, and cases cited; Tied. Real Prop. § 96. Moreover, the act of the city in building said school house did not deprive the lessee of the use of said premises, or any part thereof, for any lawful purpose excepting the sale of intoxicating liquors. And as it was no part of the contract of hiring that the lessee should use said premises for that purpose, the lessor is not at fault, because the former is unable, from whatever cause to make such use of the premises." Where, during the possession of a tenant, his landlord leases the premises to another who takes possession of a material part thereof the first tenant may treat it as an eviction and abandon the whole premises. *Miller v. Michel*, 13 Ind. App. 190 (41 N. E. Rep. 467). Citing, *Avery v. Dougherty*, 102 Ind. 443 (2 N. E. Rep. 123; 52 Am. Rep. 680); *Rice v. Dudley*, 65 Ala. 68; *Hayner v. Smith*, 63 Ill. 430 (14 Am. Rep. 124); *Upton v. Greenlees*, 17 C. B. 51-67; *Mayor v. Mabie*, 13 N. Y. 151; *Skally v. Shute*, 132 Mass. 367. No constructive eviction exists without a surrender of possession. *Barrett v. Boddie*, 158 Ill. 479 (42 N. E. Rep. 143; 49 Am. St. Rep. 172). A tenant continuing in possession after a partial eviction by the landlord is relieved from payment of rent only to the extent of the eviction. *Crossthwaite v. Caldwell*, 106 Ala. 295 (18 So. Rep. 47). Where the eviction is by the landlord he cannot recover any rent during its continuance

although the tenant may occupy a portion of the premises; nor does a subsequent voluntary payment of rent by the tenant operate as a waiver of the eviction or consent thereto. *Morris v. Kettle*, 57 N. J. L. 218 (30 Atl. Rep. 879). A landlord's mere failure to repair does not constitute a constructive eviction where the lessee admits in the lease that he received the premises in good condition and covenanted to keep them in repair. *Barrett v. Boddie*, 158 Ill 479 (42 N. E. Rep. 143; 49 Am. St. Rep. 172).

Sec. 421. Appropriation of leased premises under right of eminent domain. In a recent well considered case it is held that the taking of a portion of leased premises under the right of eminent domain is not an eviction, nor does it operate to abate or apportion the rent; and if the lease contains no covenant by the lessor to make repairs, the lessee is entitled to receive such portion of the damages assessed as is necessary to repair the injury caused by the taking. *Gluck v. Mayor etc. of City of Baltimore*, 81 Md. 315 (32 Atl. Rep. 515; 48 Am. St. Rep. 515). The court say: "It is incontrovertible that nothing but a surrender, a release, or an eviction can, in whole or in part, absolve the tenant from the obligation of his covenant to pay rent. *Fisher v. Milliken*, 8 Pa. St. 111 (49 Am. Dec. 497). Thus, if the premises have been wrongfully entered by a disseisor, and the tenant dispossessed for the entire term, or even by the military force of a public enemy, or if they have been destroyed or rendered untenable by earthquake, lightning, floods, or fire, and thus all enjoyment by the tenant entirely lost, yet his covenant remains. *Workman v. Miffin*, 30 Pa. St. 369, and cases there cited. It is also equally settled that a taking by the sovereign under the right of eminent domain is not an eviction. *Frost v. Earnest*, 4 Whart. 90; *Dobbins v. Brown*, 12 Pa. St. 75; *Ross v. Dysart*, 33 Pa. St. 452; *Railroad Co. v. Schomoele*, 57 Pa. St. 271; *Dyer v. Wightman*, 66 Pa. St. 427. The case last cited, and from which the above extract is quoted, was a condemnation proceeding, in which the fee simple was taken for the construction of a railroad. To the same effect, see *Peck v. Jones*, 70 Pa. St. 85; *Ellis v. Welch*, 6 Mass. 246 (4 Am. Dec. 122); *Parks v. City of Boston*, 15

Pick. 198; *Foltz v. Huntley*, 7 Wend. 210; *Foote v. City of Cincinnati*, 11 Ohio 408 (38 Am. Dec. 737); *Emmes v. Feeley*, 132 Mass. 846; *Stubbins v. Village of Evanston*, 136 Ill. 87 (26 N. E. Rep. 577; 11 L. R. A. 839; 29 Am. St. Rep. 800); *Corrigan v. City of Chicago*, 144 Ill. 537 (33 N. E. Rep. 746; 21 L. R. A. 212, and copious notes)." See 2 Ballards' Annual, § 349. A lessee's right to damages on account of the condemnation of the leased property for widening a street is not affected by the fact that he took his lease after the passage of the ordinance directing such improvement. *Justice v. City of Philadelphia*, 169 Pa. 503 (32 Atl. Rep. 592).

Sec. 422. Destruction of the premises. Conn. Gen. Stat., § 2969, which excuses a tenant from paying rent, though continuing his occupation, if the tenement is, without his fault or neglect, so injured as to be unfit for occupancy, is held not to apply to the case of an injury occurring from the want of ordinary repairs. *Gulliver v. Fowler*, 64 Conn. 238 (30 Atl. Rep. 852). In construing Miss. Code, § 2498, which provides that "a tenant shall not be bound to pay rent for buildings after their destruction by fire or otherwise, without negligence or fault on his part, unless he have expressly stipulated to be so bound," it is held that the statute applies to rural as well as urban property, and that a lessee of a plantation is entitled to have an apportionment of the rent in case of the destruction of a ginhouse located thereon for use in connection with the premises. *Taylor v. Hart*, Miss. (18 So. Rep. 546; 30 L. R. A. 716). La. Rev. Civ. Code, Art. 2697, 2699, construed and applied—rights of parties in case of partial destruction of premises. *Meyer v. Henderson*, 47 La. (16 So. Rep. 729).

Sec. 423. Illegal use of premises. Mere knowledge by the lessor of his lessee's intention to use the premises for an illegal purpose does not avoid the lease so as to prevent the recovery of rent. *Miller v. McGuire*, 18 R. I. 770 (30 Atl. Rep. 966). R. I. Pub. Stat., Ch. 80, § 4, which provides that the use of the premises by the tenant for the illegal sale of intoxicating liquors operates to annul the lease and gives the owner the immediate right to possession, is held not to justify the lessor in ejecting his lessee on account of the latter

permitting him to use the premises himself for such illegal purposes during a portion of each week. *Allen v. Keilly*, 18 R. I. 197 (80 Atl. Rep. 965). Ind. Rev. Stat. 1894, § 2174, applied—leasing fair ground for gambling purposes. *State v. Darroch*, 12 Ind. App. 527 (40 N. E. Rep. 689).

Sec. 424. Farming on the shares—Title to crops. A lessee in a lease of a farm on the shares forfeits his rights thereunder by an assignment of the lease. *Lewis v. Sheldon*, 103 Mich. 102 (61 N. W. Rep. 269). Where a tenant farming on the shares abandons the lands before the end of the term, the possessory right to property on the farm, including harvested crops, reverts to the lessor. *Maclary v. Turner*, 9 Houst. (Del.) 281 (82 Atl. Rep. 825). A tenant farming on the shares is not relieved from an obligation in his contract to deliver a certain portion of the crops to his landlord by reason of the fact that such services cannot be rendered without much trouble and unusual expense. His failure to perform this part of the agreement can only be excused by an act of God. *Johnson v. Bryant*, 61 Ark. 812 (82 S. W. Rep. 1081). While ordinarily, under a lease or contract providing for a division of the crops between landlord and tenant, they are tenants in common of such crops, it is competent for the parties in such lease or contract to agree otherwise, and to secure the owner of the land the ownership and title to the product until division, or the performance of conditions named. *Consolidated L. & Irr. Co. v. Hawley*, S. Dak.

(63 N. W. Rep. 904). Although a lease of a farm on the shares provided that the crop should belong to the owner until all expenses necessary to its care were paid and it had been divided according to contract, upon a review of the authorities, it is held that the lessee had such an interest in the crop as he could sell or mortgage prior to condition broken, the lease containing no covenant controverting this right, and such an agreement does not create a lien on the crop in favor of a third party performing labor thereon. *Lawrence v. Phy*, 27 Ore. 506 (41 Pac. Rep. 671). Particular facts held insufficient to constitute an abandonment of a farm leased on the shares. *Hough v. Brown*, 104 Mich. 109 (62 N. W. Rep. 143).

Sec. 425. Landlord's lien. An assignee of a rent note does not thereby become entitled to enforce a landlord's lien on crops. *Block v. Smith*, 61 Ark. 266 (82 S. W. Rep. 1070); but the agricultural lien provided for by the statute of Georgia is assignable. *Baldwin v. McCarthern*, 94 Ga. 622 (21 S. E. Rep. 578). Under Ala. Code, § 3059, the landlord may assign or mortgage his claim for rent and clothe his transferee with his own paramount lien. *Ballard v. Mayfield*, 107 Ala. 396 (18 So. Rep. 29). Where the claim for rent is so blended with other claims against the tenant as to lose its identity, no lien therefor can be enforced. Ia. Code, § 2017, applied. *Crill v Jeffrey*, Ia. (64 N. W. Rep. 625). A landlord may lose his lien by taking a note for the debt, secured by mortgage. *Smith v. Dayton*, Ia. (62 N. W. Rep. 650). A defaulting vendee may by contract become a tenant of his vendor so as to give him the right to a landlord's lien under N. C. Code, § 1754. *Jones v. Jones*, 117 N. C. 254 (23 S. E. Rep. 214). A contract by which one acquires the exclusive right to mine coal on certain lands for a specified period of years, unless the product should be exhausted before that time, and the right to use the surface of so many acres upon which to construct buildings, operate railroads, etc., the consideration being the payment of a certain royalty per ton of the coal mined, not to be less than a certain annual amount, payable as rent, creates the relation of landlord and tenant within the meaning of Ia. Code, § 2017, giving the landlord a lien for "rent." *Lacey v. Newcomb*, Ia. (63 N. W. Rep. 704). A parol agreement between landlord and tenant to the effect that the title to the crops raised should remain in the landlord, and they should be stored in a warehouse in his name, and that he should retain from the proceeds of the sale thereof an amount equal to the rent, and turn over the balance to the tenant, does not create a lien in favor of the landlord as against a creditor of the tenant attaching the crop while growing. *Stockton S. & L. Soc. v. Purvis*, Cal. (42 Pac. Rep. 441). A stipulation in a lease of farm land upon the shares to the effect that the crop raised should belong to the landowner until all expenses are paid and the same is divided does not create a lien on the crop in favor of a third party performing labor thereon. *Lawrence*

v. *Phy*, 27 Ore. 506 (41 Pac. Rep. 671). In construing Del. Rev. Code, ch. 120, § 60, it is held by a divided court that a landlord's lien for rent on the goods and chattels of his tenant is superior to a chattel mortgage thereon executed before the beginning of the tenancy. *Ford v. Clewell*, 9 Houst. (Del.) 179 (31 Atl. Rep. 715). Ala. Code, § 8069, applied—priority of landlord's lien. *Garrison v. Webb*, 107 Ala. 499 (18 So. Rep. 297). Although the special lien of a landlord for rent on crops made upon land rented from him dates from the maturity of the crops, and is superior in dignity to the lien of an older common-law judgment against the tenant, yet where the rent is payable in money, and the tenant delivers a whole or a portion of the crops to the landlord in payment or satisfaction of the rent debt, the landlord takes the same subject to the lien of the older judgment, and cannot resist the enforcement thereof by claiming the property, but must assert the priority of his lien for the rent by foreclosing the same and claiming the proceeds of the sale. Ga. Code, § 2289, and acts 1884–85, p. 91, applied. *Duncan v. Clark*, 96 Ga. 268 (22 S. E. Rep. 927). A lien, if any, which the lessor acquires upon tools and machinery of the lessee by his covenant not to remove them until all rent is paid, is a collateral security which need not be resorted to before the bringing of an action for rent. *Felker v. Richardson*, N. H. (32 Atl. Rep. 880). In Maryland it is held that a landlord cannot seize upon the personal property of his tenant for rent under a writ of distress issued after the tenant has applied for the benefit of the insolvent laws. *Fox v. Merfeld*, 81 Md. 80 (31 Atl. Rep. 583). Under Pa. Act, June 16, 1836, § 88, a landlord can claim one year's rent out of the goods and chattels of his tenant if they are taken under execution. *Platt v. Johnson*, 168 Pa. 47 (31 Atl. Rep. 935). Ala. Code, § 8075, applied—farming on shares—lien for advances—priorities. *Gardner v. Head*, Ala. (18 So. Rep. 551). N. C. Code, § 1754, applied—judgment for rent—lien on crops. *Hargrove v. Harris*, 116 N. C. 418 (21 S. E. Rep. 916). N. C. Code, § 1754, applied—landlord's lien for rent. *Fleming v. Davenport*, 116 N. C. 153 (21 S. E. Rep. 188).

Sec. 426. Landlord's lien—Liability of vendee of crops. A vendee of crops upon which a landlord has a lien for rent is liable to him for the amount of such lien, although he purchased the same in ignorance thereof. *Evans v. Collins*, Ia. (62 N. W. Rep. 810); *Blake v. Chas. Counselman & Co.*, Ia. (63 N. W. Rep. 679). In construing Tex. Rev. Stat., Arts. 8107, 8108, 8109, which give the landlord a lien upon the crops raised, which continues for one month after the removal of the property from the premises, and forbid such removal by the tenant without the consent of the landlord, it is held that one who purchases agricultural products produced upon rented premises, or other property liable to the landlord's lien for rent, within the time that the lien continues thereon, and converts the same to his own use, may be sued by the landlord for the value of the property, if it does not exceed the rent due, and, if it should exceed the rent, then for the amount of the rent. *Zapp v. Johnson*, 87 Tex. 641 (30 S. W. Rep. 861). Citing, *Boydston v. Morris*, 71 Tex. 697 (10 S. W. Rep. 331); *Prettyman v. Unland*, 77 Ill. 206; *Thornton v. Strauss*, 79 Ala 164; *Holden v. Cox*, 60 Ia. 449 (15 N. W. Rep. 269). One who assists the owner of crops, subject to a landlord's lien, in placing them beyond the reach of the lien-holder, may be held liable for damages. *Michalson v. All*, 43 S. C. 459 (21 S. E. Rep. 828).

Sec. 427. Rents. The party in possession is the only one liable for rents, fruits, and revenues. *Burney's Heirs v. Ludeling*, 47 La. 1434 (17 So. Rep. 877). Until the option is exercised, ground rent redeemable at any time by the grantee by the payment of the principal sum, is treated as real estate. *In re White's Estate*, 107 Pa. 206 (31 Atl. Rep. 569). The payment of rent creates the implication of a tenancy and of a liability to pay further rent during the occupancy. *Kiernan v. Terry*, 26 Ore. 494 (38 Pac. Rep. 671). Where one is entitled to the possession of land and it is refused upon demand, rents may be recovered in an equitable action for the land. *Griffith v. Owensboro & N. Ry. Co.*, Ky. (80 S. W. Rep. 206). One having the right to use and occupation of land is not prevented from the exercise of this right by the levying of an attachment on the land by a third

person, and he cannot recover for use and occupation during the pendency of the attachment proceedings, it not appearing that he made any effort to enforce his right to the possession. *Heatman v. Million*, Ky. (81 S. W. Rep. 478). If one goes into the possession of an estate tortuously he will be charged with rent to the extent of what it was capable of producing, but if he enters rightfully and can show what the actual income was, that will determine the extent of his liability. One who in good faith purchases at a foreclosure sale and takes possession under his purchase enters rightfully, notwithstanding his title may be subsequently adjudged void. His liability for rent will date from his possession but it should be limited to the benefits which he actually received from the estate. *Rabb v. Patterson*, 42 S. C. 528 (20 S. E. Rep. 540; 46 Am. St. Rep. 743). Rent cannot be recovered for the use of improvements erected in good faith by one holding possession under color of title. *Deitzler v. Wilhite*, 55 Kan. 200 (40 Pac. Rep. 272). A guaranty for the payment of rent may be assigned without the consent of the guarantor. *Cunningham v. Norton*, Cal. (40 Pac. Rep. 491).

In order to maintain an action for rent a tenancy must be established, *Pheland v. Vandee*, Ala. (16 So. Rep. 696); *Lamb v. Lamb*, 146 N. Y. 817 (41 N. E. Rep. 26), but it is not necessary to show the beginning or termination of the tenancy, it being sufficient to show a contract, express or implied, between the landlord and tenant, and occupation, actual or constructive, by the latter. *Rogers v. Coy*, 164 Mass. 891 (41 N. E. Rep. 652). The landlord is not required to show a good title against all the world, it being sufficient to show that the defendant occupies as his tenant. *Kiernan v. Terry*, 26 Ore. 494 (38 Pac. Rep. 671). Although it may not be made to clearly appear whether an occupant entered under a parol or a written lease, he is liable for use and occupation, and parol evidence is admissible as to the value and length of such occupation and whether any payment has been made therefor. *Hellams v. Patton*, 44 S. C. 454 (22 S. E. Rep. 608). Actions pending to recover rent under a contract were held not affected by a cancellation of the contract for nonpayment of rent. *Mayor etc. of N. Y. v. New York Ref. Const. Co.*, 146 N. Y. 210 (40 N. E. Rep. 771).

A lessor cannot recover rent after he has evicted the lessee. *Wreford v. Kenrick*, Mich. (65 N. W. Rep. 234). In case of several joint lessees judgment for rent may be had against any one of them. *Ding v. Kennedy*, 7 Colo. App. 72 (41 Pac. Rep. 1112). Where a demise is by written lease no action for rent can be maintained during the existence of such lease against one who is not a party thereto. *Beck v. Eagle Brewery*, N. J. Eq. (30 Atl. Rep. 1100). The court say: "The rule that an unnamed and unknown principal shall stand liable for the contract of his agent does not apply to a demise under seal. The relation between the owner of the land and those who occupy it is of a purely legal character, and the fact that the lessee takes a lease for an unnamed principal, but in his own name, will not render the unnamed principal liable for the rent. *Borcherling v. Katz*, 37 N. J. Eq. 150; *Walters v. Mining Co.*, 5 De Gex, M. & G. 629; *Cox v. Bishop*, 8 De Gex, M. & G. 815; *Kiersted v. Railroad Co.*, 69 N. Y. 343." A distress warrant for rent may be levied upon property in the hands of the lessee's assignee for the benefit of creditors. *Pain v. Sykes*, 72 Miss. 351 (16 So. Rep. 903). In New Jersey it is held that in an action on a covenant to pay rent the defense of eviction must be specially pleaded. *Morris v. Kettle*, 57 N. J. L. 218 (30 Atl. Rep. 879). Where the lessee retains possession of property he cannot defeat an action for rent by the lessor on account of a defect in the latter's title which the lessor offers to perfect but is prevented from doing so by the lessee. *Kunkle v. People's Nat. Gas Co.*, 165 Pa. St. 133 (30 Atl. Rep. 719). Where, as a defense to an action for rent, the defendant makes affidavit that he was enjoined from interfering with the possession and use of the leased premises by a railroad company which injunction amounted to an eviction, he is entitled to have all the facts heard and determined. *Friend v. Oil Well Supply Co.*, 165 Pa. St. 652 (30 Atl. Rep. 1134). An agreement of a subtenant to pay rent to the original lessor does not relieve the lessee from liability for such rent, unless the lessor accepts the subtenant as tenant. *Bless v. Jenkins*, 129 Mo. 647 (31 S. W. Rep. 938). In an action for rent a lessee cannot recoup damages for injury by the lessor of the premises while they are occupied by persons to whom the lessee has sold his busi-

ness, who are to pay therefor out of a certain portion of the profits. *Powers v. Daily*, Mich. (68 N. W. Rep. 979). A lessee whose possession has not been disturbed cannot defeat his lessor's action for rent by showing the existence of a paramount title in another. *Hochenauer v. Hildebrant*, 6 Colo. App. 199 (40 Pac. Rep. 470). A tenant cannot deduct from his rent damages which have been occasioned to him by the wrongful and tortuous acts of strangers. *Vogel v. McAuliffe*, 18 R. I. 791 (81 Atl. Rep. 1). The right to recover rent is not barred on account of there being a forfeiture of the estate by the lessee until there has been an actual re-entry by the lessor. *Brigham Young Trust Co. v. Wagner*, 12 Utah 764 (40 Pac. Rep. 764). For consideration of particular assignment and subletting with reference to who is a proper party to sue for rents, see, *Latta v. Weis*, 131 Mo. 230 (32 S. W. Rep. 1005). Ga. Code, §§ 2285, 4082, applied—issuance and sufficiency of distress warrant. *Callaway v. Phillips*, 95 Ga. 801 (22 S. E. Rep. 704). Va. Code, § 2898, applied—action for wrongful levy of distress warrant. *Fishburne v. Engledove*, 91 Va. 548 (22 S. E. Rep. 854). Rights of executors and administrators as to rents, see Executors and Administrators.

Sec. 428. Repairs. In the absence of an express covenant to do so there is no obligation resting on a landlord to make repairs. *Reeves v. McComeskey*, 168 Pa. 571 (32 Atl. Rep. 96). A covenant on the part of a lessor to make repairs will not be implied from a clause in the lease, "Said premises shall be at all times open to the inspection of said lessor or his agents, to applicants for purchase or lease, and for necessary repairs," taken in connection with the fact that the lessor had made certain repairs as requested, and made no claim that the lessee was responsible for repairs. *Gulliver v. Fowler*, 64 Conn. 556 (30 Atl. Rep. 852). A covenant to make repairs cannot be engrafted into a written lease by parol evidence. *Gulliver v. Fowler*, 64 Conn. 556 (30 Atl. Rep. 852); but a landlord may, by a parol promise subsequent to the lease, bind himself to pay for repairs, and the promise of his tenant to pay a portion of the costs thereof is a sufficient consideration for such agreement. *Woodworth v. Thompson*, 44 Neb. 311 (62

N. W. Rep. 450). Where a written lease of property provides that the lessee shall keep the same in repair except as to unavoidable accidents and natural wear and tear, the law will not imply a contract on the part of the lessor to repair damages caused by unavoidable accidents. *Clifton v. Montague*, 40 W. Va. 207 (21 S. E. Rep. 858). In an action for the breach of his lessor's covenant to repair, the lessee is entitled to recover all such damages as might be reasonably and naturally expected to flow from the breach. He is entitled to be compensated for injury to furniture, and to recover the difference between the rental value of the building as it actually was and what it would have been worth if the covenant of repair had been complied with. *Kohne v. White*, 12 Wash. St. 199 (40 Pac. Rep. 794). A lessee does not lose his right of action for breach of his lessor's covenant to deliver the premises in good condition and to make repairs, by taking possession and occupying the leased premises. *Thomson-Houston Elec. Co. v. Durant L. Imp. Co.*, 144 N. Y. 34 (39 N. E. Rep. 7).

Sec. 429. Miscellaneous notes. A subtenant is charged with notice of the existence of the tenant's lease, and is bound by its terms and conditions. *Blackford v. Frenzer*, 44 Neb. 829 (62 N. W. Rep. 1101); *Shannon v. Grindstaff*, 11 Wash. St. 536 (40 Pac. Rep. 123). The tenant of a lower floor may recover damages from the landlord for injury to his goods and machinery resulting on account of leakage from wet hair negligently stored in the upper story of the building by the landlord. *Hysore v. Quigley*, 9 Houst. (Del.) 348 (32 Atl. Rep. 960). Ga. Code, § 4077, applied—summary ejectment of tenant for nonpayment of rent. *Clifford v. Gressinger*, 96 Ga. 798 (22 S. E. Rep. 399). A tenant may defeat an action brought by his landlord under Minn. Gen. Stat. 1894, § 6118, to obtain possession on account of nonpayment of rent, by tendering to the landlord the amount due, with interest, and an offer to pay all costs which have accrued in the action. *George v. Mahoney*, 62 Minn. 370 (64 N. W. Rep. 911).

LEASES.

EPITOME OF CASES.

- **Sec. 430. Lease defined.** "A lease 'is a contract by which one person divests himself of, and another takes the possession of, lands or chattels for a term, whether long or short.' Woods, Landl. & Ten., § 208. 'A lease at the common law, is a grant of assurance of a present or future interest for life, or for years, or at will, in lands or other property of a demisable nature, a reversion being left in the party from whom the grant of assurance proceeds.' Platt, Leas. 1. 'A lease is a species of contract for the possession and profits of lands and tenements, either for life, or for a certain number of years, or during the pleasure of the parties.' 12 Am. & Eng. Enc. Law, p. 976. 'No particular form of expression or technical words are necessary to constitute a lease, but, whatever expressions explain the intention of the parties to be that one shall divest himself of the possession of his property and the other shall take it for a certain space of time are sufficient, and will amount to a lease for years, as effectually as if the most proper and permanent form of words had been made use of for that purpose.' Id. p. 977." *Lacey v. Newcomb*, Ia. (68 N. W. Rep. 704). For an elaborate collation of authorities upon the distinction between a lease and a license, see *Stinson v. Hardy*, 27 Ore. 584 (41 Pac. Rep. 116). A lease of real estate, and a transfer of possession thereunder, is a species of conveyance. *McKinnis v. Scottish-Amer. Mort. Co.*, 55 Kan. 259 (39 Pac. Rep. 1018). An agreement by which the lessor "hereby lets, demises, and leases" certain premises for a term ending at a fixed time and to begin in the future upon the completion of a certain building which he binds himself to erect and have ready for occupancy at a given time is a valid lease. *Colclough v. Carpeles*, 89 Wis. 239 (61 N. W. Rep. 836). Particular facts held to create a lease by

correspondence. *Culton v. Gilchrist*, Ia. (61 N. W. Rep. 384).

Sec. 431. Construction of leases. The terms of a written lease cannot be changed by parol evidence. *Kelly v. Chicago M. & St. P. Ry. Co.*, Ia. (61 N. W. Rep. 957). In determining whether a verbal lease was for one year it was held proper to admit evidence showing the manner of the payment of rent. *Fenkins v. Gastonia Cotton Mfr. Co.*, 115 N. C. 535 (20 S. E. Rep. 724). A lease of land to a railroad company for depot purposes "for the better accommodation of the public," which is to continue "so long as the same shall be used for railroad purposes," was held to terminate when the company ceased to use the land for "public" railroad purposes. *Kugel v. Painter*, 166 Pa. 592 (31 Atl. Rep. 388). A provision in a lease that the lessee may buy the land "at the option of the parties" means that the lessee may buy at his own option. *Mack v. Dailey*, 67 Vt. 90 (30 Atl. Rep. 686). Where a lease for a given number of years provided for its renewal for a like term upon election and notice by the lessee to that effect, and also provided that the lessor would convey the premises to the lessee "at any time during the tenancy hereby created or agreed upon," for a fixed price, if the lessee should so desire, it is held that the lessee's right to purchase could be exercised during the renewed term. *Congregation of Sons of Abraham v. Gerbert*, N. J. L. (31 Atl. Rep. 383). Where a lease provided that the lessee should pay a certain rent so long as he should "occupy" the premises it is held that the provision as to occupancy meant tenancy under the lease, and the lessee could not avoid this liability by removing from the premises before the lawful termination of the lease. *Lane v. Nelson*, 167 Pa. 602 (31 Atl. Rep. 864). The court say: "'In the primary and most familiar sense of the word 'occupy,' it is the equivalent of the word 'possess.'" It implies the conception of permanent tenure for a period of greater or less duration.' *Lacy v. Green*, 84 Pa. St. 520. Lord Denman said: 'The meaning of the word "occupied" may vary according to the occasion or the subject matter. The meaning therefore, which it has received in considering what occupation was necessary to con-

stitute a mansion house, in which burglary might be committed, or to give a right of voting, or to make a party ratable to the relief of the poor, is no test of its meaning in this particular case.' *Rex v. Inhabitants of St. Nicholas*, 5 Barn. & Adol. 227. That the meaning of the word may vary according to the occasion, the subject-matter, or the context is shown in a number of decided cases. Two of these which have come to our attention seem to be in point. Where, in a conveyance from A to B, there was reserved to A. the right 'to live in, inhabit, dwell in, and occupy the said cottage, with the appurtenances, as he heretofore has done, and now does, for and during the term of his natural life,' it was held that an estate for life was reserved. Kenyon, J., said: 'If this question had depended on the first words of the proviso, I should have thought they would have been satisfied by determining that only liberty to inhabit the cottage was given to A., but the word "occupy" carries the interest reserved still further, and shows that the whole estate was intended to be reserved to him.' *Rex v. Inhabitants of Easington*, 4 Term R. 181. B. guaranteed the payment of A.'s rent 'so long as said A. shall occupy the premises.' It was held that the word 'occupy' was used, not simply in the narrower sense of actual or personal occupancy, 'but the larger sense of tenancy actually existing under the lease. Such use of the word is not uncommon.' *Morrow v. Brady*, 12 R. I. 181." Provisions in a lease that, "in case of loss by fire so as to render the premises untenable, this lease may be terminated by either party hereto, unless it is mutually agreed to repair, and the same can be done in a reasonable time, so as not to utterly prevent the business from being prosecuted," and that, "in case said premises shall be rendered untenable by fire or other casualty, the lessor may, at his option, terminate this lease, or repair said premises within thirty days, and failing so to do, or upon the destruction of said premises by fire, the term hereby created shall cease and determine," were held not to be inconsistent, and that the lessor should repay the damages which resulted to the building from the explosion of a stationary boiler which was leased as a part of the premises. *John Morris Co. v. Southworth*, 154 Ill. 118 (89 N. E. Rep. 1099). Particular lease of ferry privileges construed. *New*

York & B. F. Co. v. Mayor etc. of New York, 146 N. Y. 145 (40 N. E. Rep. 785).

Sec. 432. Provision for determination of rent by appraisement—Power of courts. Where a lease provides that the rental shall be a certain per cent. of the value of the premises, to be determined by appraisers, a court of equity may determine the value of the property where the appraisers failed to reach an agreement. *Springer v. Borden*, 154 Ill. 668 (39 N. E. Rep. 608). The court say: "The same question involved here arose in *Furniture Co. v. Rowe*, 18 Ill. App. 298, and it was there held that while a court of equity will not specifically enforce a contract for arbitration by compelling the appointment of arbitrators, or by compelling them to act when appointed, where the rights of the parties are made to depend upon an appraisal of property, and the appraisal provided for in the contract has failed, courts, both of equity and of law, will interfere to prevent a failure of justice by hearing the evidence and making the appraisement. The contract in that case and the one here involved are so similar that any rule applicable to one must control the other. In *Kelso v. Kelly*, 1 Daly 419, where a lease provided for a second term of five years, the rent to be fixed by arbitrators to be chosen, an award was made, but failed, whereupon a bill was filed to have the court fix and determine the rent. In disposing of the case, it is said: 'If the rent is to be fixed, not by the parties, but by arbitration, the court can, by taking proof, ascertain and fix it with as much certainty as the arbitrators could do; and if the mode of determining it by arbitration cannot be resorted to, through the refusal of one of the parties to appoint an arbitrator, there is no reason why the other party should lose the benefit of a contract in all other respects, valid and binding, when the court has the means of fixing what so eminent a judge as Sir William Grant regarded as a mere matter of detail. * * * But the plaintiff cannot give a new lease until the amount of the rent is fixed. As the defendant will not appoint an arbitrator, the plaintiffs are entitled to the equitable aid of the court to ascertain it; that being the only mode under the circumstances in which it can be ascertained and fixed. The relief sought is purely of an

equitable nature, to which the plaintiffs are entitled if they have no adequate legal remedy. * * * If the remedy which the party may have at law will not put him in a situation as beneficial to him as if the agreement were specifically performed, relief will be afforded in equity.' In *Viany v. Ferran*, 54 Barb. 529, a similar question arose, and the same doctrine was announced. See, also, *Coles v. Peck*, 96 Ind. 338 (49 Am. Rep. 161); *Lowe v. Brown*, 22 Ohio St. 463; *Dinham v. Bradford*, 5 Ch. App. 519. In *Strohman v. Zeppenfeld*, 3 Mo. App. 429, a lease contained covenants of renewal, upon a valuation of the premises, to be determined by two freeholders. The appraisement failed, and the lessee filed a bill for relief. In the decision of the case the court said: 'As has been shown, a court of equity does not enforce the contract as made by the parties, in such cases as at present. On the contrary, equity proceeds upon the basis that the contract, as made, cannot be enforced, and applies its own remedies to the violation of its rules. The relief given is of a purely equitable nature, and the ground upon which the plaintiff is entitled to it is that, while he has a clear right of action, he has no adequate remedy at law. In the case of a covenant like that now in question, it is obvious that it is not of the essence of the contract that the valuation should be made by disinterested freeholders, rather than by a court of equity. That is an immaterial detail, and a mode as effective and fair may be found. Accordingly, the court should hear evidence; and upon the case as made, and upon the facts, as ascertained from the evidence, specific performance may be decreed.' As has been seen, the contract of the lessee required the cash value of the premises to be determined at a specified time, and he agreed to pay rent upon the cash value so ascertained. There was a failure to observe this part of the contract, and the value of the premises was not determined. The bill is in the nature of a bill for specific performance, and while it does not ask to have appraisers appointed, and to have them proceed and determine the value of the property, the court is asked to hear the evidence, and from this evidence do what the contract required the appraisers to do—fix the value of the property so that a basis may be laid for ascertaining the amount of rent the lessor is entitled to recover. The bill,

therefore, being for specific performance, a court of equity had jurisdiction."

Sec. 433. Covenants in leases. The covenant of the lessee to pay rent and of the lessor to make repairs are distinct and independent covenants. *Thomson-Houston Elec. Co. v. Durant L. Imp. Co.*, 144 N. Y. 34 (39 N. E. Rep. 7). Where the performance of a lessor's covenant is necessary to fit the premises for habitation, the lessee may sue for specific performance of such covenant before entering into possession. *Jones v. Parker*, 163 Mass. 564 (40 N. E. Rep. 1044; 47 Am. St. Rep. 485). There is no implied warranty that premises rented for occupancy are in a tenantable condition. *Blake v. Dick*, 15 Mont. 236 (38 Pac. Rep. 1072; 48 Am. St. Rep. 671). A lessee's covenant to keep the premises "in a cleanly and healthful condition" does not bind him to remove filth placed thereon by the landlord after the beginning of the lease. *Sully v. Schmitt*, 147 N. Y. 248 (41 N. E. Rep. 514). A lessee's covenant not to "make or suffer any waste, or any unlawful, improper, or offensive use of said premises," is a stipulation that there shall be no unlawful use by the original lessee or by any person who is occupying under him. *Miller v. Prescott*, 163 Mass. 12 (39 N. E. Rep. 409; 47 Am. St. Rep. 437). A covenant in a lease of an office room in a building to a telegraph company that "during said term the lessor will not lease offices in said building to any other telegraph company for use as a general telegraph office," was held not broken by a sale of the building to another telegraph company to be used as its general office. *Postal Tel. Cable Co. v. Western U. Tel. Co.*, 155 Ill. 335 (40 N. E. Rep. 587). In an action for breach of covenant for quiet enjoyment the breach must be set forth particularly. *Chestnut v. Tyson*, 105 Ala. 149 (16 So. Rep. 723). A lessee who has been evicted by an action prosecuted by a third person who had title paramount to the covenanting lessor at the time of the execution of the lease, may maintain an action for damages on the covenant for quiet enjoyment although his lessor had no notice of the action for eviction, but special damages, such as the expenses incurred in defending the suit for eviction, cannot be recovered unless the covenantee notified his covenantor of the pendency of the suit for eviction

and requested him to defend the same. *Chestnut v. Tyson*, 105 Ala. 149 (16 So. Rep. 723). A trustee or guardian can not bind his beneficiary by a covenant for quiet enjoyment in a lease of the trust lands, but where they make such a covenant they become personally liable thereon. *Chestnut v. Tyson*, 105 Ala. 149 (16 So. Rep. 723). A lessor's right to enter for breach of covenant is not waived by the acceptance of accrued rent, where such acceptance is made under an express agreement that the right to enter is not thereby waived. *Miller v. Prescott*, 163 Mass. 12 (39 N. E. Rep. 409; 47 Am. St. Rep. 434). An action for injury to furniture and fixtures which the lessee covenants to return at the termination of the lease in as good condition as when the lease was made, cannot be maintained until the termination of the lease. *Fratt v. Hunt*, 108 Cal. 288 (41 Pac. Rep. 12). A provision in a lease of property owned by a railroad company and adjoining its railroad grounds, that such company shall not be responsible for any damage to buildings thereon, caused by fire, is not void as against public policy. *Stephens v. Southern Pac. Co.*, 109 Cal. 86 (41 Pac. Rep. 788; 50 Am. St. Rep. 17; 29 L. R. A. 751). Where a corporation lessee voluntarily dissolves and a receiver is appointed to wind up its affairs, who refuses to continue the lease, the lessor has an immediate cause of action for a total breach thereof and is entitled to prove his claim for such damages against the receiver, and share ratably in the distribution of the assets of the corporation. *Kalkhoff v. Nelson*, 60 Minn. 305 (62 N. W. Rep. 332). In such a case the receiver has a reasonable time in which to elect whether he will accept or reject the lease, and his occupancy of the premises for the purpose of selling personal property, under the direction of the court, does not operate as an acceptance of the lease; however, the lessee is entitled to rent as specified in the lease for whatever time the receiver so occupies the property. *In re Bishop*, 60 Minn. 305 (62 N. W. Rep. 335). Where a lessee of a boarding house seeks to recover damages on a breach of warranty, on account of a defective heating apparatus, his measure of damages is the rental value of the rooms, for the purpose of letting which he had hired the house, which he could not let, on account of the lack of proper heating in them; and in making proof of such damage it is not proper to

restrict such proof to evidence of applications for rooms actually made and withdrawn on account of the lack of heat. *Gulliver v. Fowler*, 64 Conn. 288 (30 Atl. Rep. 852). When a building erected for business purposes is rented as a whole, without any specific reference to a use by way of subletting, or where such a use is not the primary purpose contemplated by the parties, the damages for the breach of a covenant to repair is the difference in the rental value of the premises as they are and as they were to be, regarding the premises as a whole, and that they are not to be measured by supposed loss by reason of the tenant being unable to parcel out separate portions and let them to undertenants. But where the lease provides that until the repairs which the lessor covenants to make are made, the rent reserved shall be abated in proportion as it is "agreed such rent shall abate in case of damage by fire," it is held that the measure of damages for the breach of such covenant to repair is fixed by the same rule specified in the lease for the abatement of rent in case of fire. *Thomson-Houston Elec. Co. v. Durant Imp. Co.*, 144 N. Y. 84 (89 N. E. Rep. 7). Where a party in a written lease describes the property as "the premises known as the 'Bedford Salt Furnace Property,' together with all the appurtenances thereto belonging, including six salt wells, tools and fixtures of the same," there is no implied covenant on the part of the lessor that there are on said premises six salt wells of any particular productive capacity, or suitable for the purposes for which they are leased. The recitals contained in said lease as to the number of salt wells included in the premises after the lease has been accepted and acted on for more than two years by the lessee, with ample opportunity of knowing, not only the contents of the lease, but the character and quality of the property leased, must be regarded as conclusive of the fact between the parties to said lease. The words "including six salt wells," contained in said lease, create no implied warranty that there were six salt wells on said premises of any particular quality or fitness for manufacturing salt. *Clifton v. Montague*, 40 W. Va. 207 (21 S. E. Rep. 858).

Sec. 434. Renewal of lease. An assignee of a lease as to a portion of the premises may avail himself of the

benefit of a covenant for removal. *Cook v. Jones*, 96 Ky. 288 (28 S. W. Rep. 960). A provision in a lease for a definite period giving the lessee refusal of the premises for a like period upon the expiration of the first period, is not a demise to take effect at such expiration; but is a mere covenant or undertaking of the lessor to let the lessee have a second term if he so desires. *Steen v. Scheel*, 46 Neb. 252 (64 N. W. Rep. 957). A covenant in a lease for one year which provides that, if the leased premises "are not sold or leased at the expiration of this lease, then the lessee is to have this said lease renewed for a term of one year or more, at its expiration, on the same terms," is merely an executory conditional covenant for a renewal of the lease, and not a present demise for a second year. *Swank v. St. Paul City Ry. Co.*, 61 Minn. 428 (68 N. W. Rep. 1088). Where notice is required of the lessee's intention to claim a renewal of the lease, notice must be given, or the intention otherwise manifested, a mere naked holding over being insufficient to create such renewal. *Cooper v. Foy*, Mich. (68 N. W. Rep. 414). One having a lease of premises for a definite period "with the refusal of leasing said property for the term of two years longer," from the expiration of such period, who before such expiration removes from the property and ceases to exercise any control over it, further than the retention of the key for about two months, when he sent it to the lessor, does not thereby create the presumption that he elects to renew the lease. *Steen v. Scheel*, 46 Neb. 252 (64 N. W. Rep. 957). One having an option for the renewal of a lease for a given number of years cannot claim the right for a less number of years and a notice by him to the lessor to the effect that he elects to renew the lease for such less number of years will be regarded as a notice that he does not elect to take for the further term agreed upon. *Williams v. Mershon*, 57 N. J. L. 242 (30 Atl. Rep. 619).

Sec. 435. Assignment of leases. A lessee's assignee may reassign the lease in order to avoid liability on its covenants. *Tibbals v. Iffland*, 10 Wash. St. 451 (89 Pac. Rep. 102); but a lessor cannot defeat performance of his covenants by an assignment of lease. *Jones v. Parker*, 168 Mass. 564

(40 N. E. Rep. 1044). A lessee who assigns his lease, expressly covenanting that the assignment is not to affect his liability on the original covenants, remains primarily liable for the payment of rent. *Latta v. Weis*, 181 Mo. 280 (82 S. W. Rep. 1005). A sublease by the lessee given for the precise unexpired term of the lessee, and reserving precisely the same amount of rent as the original lease operates as an assignment of the lease. *Firth v. Rowe*, 58 N. J. Eq. 520 (82 Atl. Rep. 1064). Where a lessee conveys his interest in part of the leased property for the whole term, it operates as an assignment *pro tanto* of the lease and is not a sublease. *Cook v. Jones*, 96 Ky. 283 (28 S. W. Rep. 960); *Alford v. Jones*, Ky. (80 S. W. Rep. 1018). A lessee of a farm on the shares cannot assign his lease. *McCammon v. Detroit L. & N. R. Co.*, 108 Mich. 104 (61 N. W. Rep. 278). One who obtains possession of a leasehold and of the income derived therefrom, by means of an assignment or other conveyance must indemnify his vendor against the payment of rent, at least so long as he continues to hold the estate. *Blood v. Crew Levick Co.*, 171 Pa. 328 (88 Atl. Rep. 844). A written instrument, executed and delivered by the assignor of a lease contemporaneously with its assignment, stipulating that the lease "is genuine and in full force and effect," and guarantying to the assignee "the rights and title of said lease," is founded on a sufficient consideration, and amounts to a covenant of *seisin* by the assignor of the demised premises, and that the assignee shall peaceably enjoy the same during the term of the lease, according to its provisions. Such covenant is broken if the assignor has not the possession of the premises at the time of the assignment, and is unable to deliver the same to the assignee on account of a prior and paramount title and possession of another; and the assignee's right of action for the breach of the covenant will not be affected by his subsequent purchase of the paramount title, and possession thereunder. The measure of the damages which the plaintiff may recover in such action is the amount of the consideration paid for the lease, with interest; and it is not essential to the recovery that the lease be re-assigned or tendered back. *Wetzel v. Richcreek*, 58 O. St. 62 (40 N. E. Rep. 1004).

Sec. 436. Assignment of lease—Transfer of privilege of purchasing. The right given to a lessee to purchase the premises within a given time, at a fixed price, partly on credit, is personal, and does not pass to the assignee of such lessee. *Menger v. Ward*, 87 Tex. 622 (30 S. W. Rep. 853). The court say: "It has been held in a number of courts that, where the lease contains an agreement that the lessee may purchase the land during the continuance of the lease, the assignment of the lease conveys to and invests in the assignee the same right. *Kerr v. Day*, 14 Pa. St. 112 (53 Am. Dec. 526); *Jackson v. Livingston*, 7 Cow. 285; *Laffan v. Naglee*, 9 Cal. 662 (70 Am. Dec. 678); *Hall v. Center*, 40 Cal. 63; *Schroeder v. Franklin*, 10 Nev. 855. If it be true that under the facts of this case an assignment of the lease would have invested the assignee with the right of purchase, then it must be held that the mortgage authorizes the sale of the leasehold with that right, as a consequence of the sale being vested in the purchaser. In all the cases cited, and all that we have found, which hold the doctrine that the assignment of the lease carries with it the privilege to purchase the property where that right is given to the lessee by the contract, the terms of purchase prescribed were for cash, or no terms of payment were fixed beforehand. In such case it might be consistently held that the privilege was not personal, for the reason that in the exercise of the right no new contractual relations would be created in case of cash payment, and, in cases where no terms were fixed, the owner of the land could make the payment cash, if he did not choose to grant a credit, and thus the terms would be a matter of agreement. There is, however, an important principle in the law of contracts applicable to the facts of this case that distinguishes it from the cases cited, which is well stated, thus: 'Rights arising out of contract cannot be transferred if they involve a relation of personal confidence, such that the party whose agreement conferred those rights must have intended them to be exercised only by him in whom he actually confided.' Pol. Cont. (4th Ed.) p. 425; *Lansden v. McCarthy*, 45 Mo. 106; *Arkansas Valley Smelting Co. v. Belding Min. Co.*, 127 U. S. 379 (32 L. Ed. 246; 8 Sup. Ct. Rep. 1308); *Delaware Co. Com'rs*

v. *Diebold S. & L. Co.*, 133 U. S. 473 (10 Sup. Ct. Rep. 899); *Burck v. Taylor*, 152 U. S. 684 (14 Sup. Ct. Rep. 696)."

Sec. 437. Breach of contract to lease—Measure of damages. Where a person contracts to lease at a certain rent land which he does not own, and hence is unable to perform the contract, the measure of damages is the loss of the bargain—that is, the difference between the rent agreed on and the actual rental value of the premises. *Knowles v. Steele*, 59 Minn. 452 (61 N. W. Rep. 557). In an action by a lessee against his lessor for a breach of a contract to lease farm lands, it is error to allow the tenant to prove the probable profit which he would realize from the cultivation of the land; his measure of damages is the actual damages which proximately flow from the breach. *Smith v. Phillips*, Ky. (29 S. W. Rep. 858).

Sec. 438. Miscellaneous notes. Only parties to a written lease can sue for a breach thereof. *Burwitz v. Jeffers*, 103 Mich. 512 (61 N. W. Rep. 784). One of the three joint lessees is bound by the acts of the other two. *Hooks v. Forst*, 165 Pa. St. 238 (30 Atl. Rep. 846). In case of the dissolution of voluntary association a lease held by it passes to its members who may exercise it jointly. *Sommers v. Reynolds*, 103 Mich. 807 (61 N. W. Rep. 501). Parties to a lease may adopt, as a part thereof, the terms of a lease existing between one of them and a third party, the terms of such lease being known to both of them. *Eubank v. May & Thomas H. Co.*, 105 Ala. 629 (17 So. Rep. 109). Where a lease provides that if the lessee performs all its conditions he may purchase the property, an acceptance of rent after it is due by the landlord, without objection, waives a breach of the condition as to the time of its payment. *Mack v. Dailey*, 67 Vt. 90 (30 Atl. Rep. 686). A lessee who inspects the premises before executing the lease cannot avoid the same because the lessor failed to inform him that a cellar thereon was liable to become flooded in case of rain. *Blake v. Dick*, 15 Mont. 236 (38 Pac. Rep. 1072; 48 Am. St. Rep. 671). Where the execution of a lease is procured by fraudulent representations of the lessor on account of which the lessee suffers damage he may recoup therefor in an action for rent, or, if he has fully paid the rent, recover

damages in an action instituted for such purpose, and where the fraud is such as requires the tenant to remove from the premises, he may recover, as damages, the actual, unavoidable expenses of such removal. *Barr v. Kimball*, 48 Neb. 779 (62 N. W. Rep. 196). One who guarantees the payment of rent by a lessee is not released by a subsequent agreement between the lessor and lessee by which the former agrees to credit the latter a certain amount on the rent if he will make certain improvements. *Morrill v. Baggott*, 157 Ill. 240 (41 N. E. Rep. 639). A lessee having the right to sublet any portion of the premises may mortgage his leasehold estate. *Menger v. Ward*, 87 Tex. 622 (80 S. W. Rep. 858). A lessor may maintain an action against his lessee for damages resulting from negligence in the charge of demised premises, and such an action is not barred by a former judgment for rent obtained by the lessor. *Wright v. Tileston*, 60 Minn. 34 (61 N. W. Rep. 823). The lessee of a railroad is not liable for injury resulting to land from the improper construction of the road by his lessor. *Kearney v. Central R. Co.* 167 Pa. 362 (31 Atl. Rep. 637).

LICENSE.

EPITOME OF CASES.

Sec. 439. Creation, definition and revocation of.
 An occupancy of land under a contract, void, as against public policy, cannot be treated as a possession under a license for the purpose of obtaining relief in equity. *Carley v. Gitcheell*, Mich. (62 N. W. Rep. 1003). A license must be established by proof and is not to be inferred by equivocal declarations of the land owner. *Pennsylvania P. & B. R. Co. v. Trimmer*, N. J. Eq. (31 Atl. Rep. 310). Where the instrument creating the license contains the provision that it shall terminate upon the disposal of the property by the licensor, a conveyance from him terminates the license, *ipso facto*, without notice to the licensee. *Francis Gowdy Distilling Co. v. Grant*, 65 Conn. 473 (32 Atl. Rep. 936).

Revocation may be presumed from a long period of nonuser. *Tatum v. St. Louis*, 125 Mo. 647 (28 S. W. Rep. 1002). Where a municipality grants to a private party the right to construct a drain or lay pipes along its highways, no vested right can accrue by the continued use of the same and the permission amounts to a mere license which may be revoked at any time. The city as to its streets is a trustee for the use of the public. A trustee of property for the benefit of the public could not, any more than could a trustee of private property held for known specific and continuing use, alien or incumber the property to the prejudice of the beneficiary; and a person dealing with the trustee, in either case, would be bound to take notice, at his peril, of the limitation of the power. *Eddy v. Granger*, R. I. (81 Atl. Rep. 881; 28 L. R. A. 517). It is held that the privilege to discharge water from ore washers into a stream given without words of grant by a lower proprietor to an iron company as long as it "may wish to run or have run" said washers, with an agreement to accept a certain sum as the full amount of damages done by such water, is a license and not an easement and does not extend to the grantees of such iron company; and that an instrument creating an easement is within the operation of the statute of frauds. *Nunnelly v. Southern Iron Co.*, 94 Tenn. 897 (29 S. W. Rep. 861; 28 L. R. A. 421). In this case a number of authorities are collated on the distinction between an easement and a license. The revocation of a license will not be permitted where such revocation will amount to a fraud upon the licensee. *Baldwin v. Taylor*, 166 Pa. 507 (81 Atl. Rep. 250); *Western Union Tel. Co. v. Bullard*, 67 Vt. 272 (81 Atl. Rep. 286); *Garrett v. Bishop*, 27 Ore. 349 (41 Pac. Rep. 10). For cases with annotations, see, *Ballards' Annual*, Vol. 1, §§ 279-283; Vol. 2, § 182; Vol. 3, §§ 234, 237, 445.

Sec. 440. Assignment of license — Adverse holding of transferee. "Possession by the transferee after the license has been thus terminated may become adverse, but not necessarily so. That will depend on circumstances. The rule is that where the entry is permissive the statute will not begin to run against the legal owner until an adverse holding is declared, and notice of such change is brought to the knowledge

of the owner. The possession of the owner cannot be disturbed by the adverse act of a licensee, any more than of a lessee. In both cases his possession is the possession of the owner, and his grantee or assignee but steps into his shoes, and takes *cum onere*. While an attempted transfer of the right of the licensee terminates the license, and the licensor has the right to treat the transferee as a trespasser, yet it is optional with him to do so, or to continue to renew the license. His acquiescence in the possession of the transferee, without interference or prohibition, may be such as to be regarded as amounting to a continuance or renewal of the license in favor of successive occupants. It is true that under certain circumstances the true owner may have acquiesced in the possession of a license, or even of a lessee, after the termination of the license or the lease, without asserting his legal rights, for such a length of time that a presumption would arise that the possession had become adverse." *Cameron v. Chicago, M. & St. P. Ry. Co.*, 60 Minn. 100 (61 N. W. Rep. 814).

LIENS.

EPITOME OF CASES.

Sec. 441. Judgment liens—Estate to which they attach—Extent of lien. The lien of a judgment does not exceed the actual interest the judgment debtor had in the land at the time a transcript of such judgment rendered by a justice of the peace was filed in the office of the clerk of the district court of the proper county, and such judgment lien is subject to every equity at that time existing against the judgment debtor. *Chadron L. & B. Ass'n v. Hamilton*, 45 Neb. 369 (63 N. W. Rep. 808). The lien of a judgment against an agent does not attach to land to which he holds the legal title which in equity belongs to his principal. *Petit v. Hubbell*, Mich. (63 N. W. Rep. 407). In construing Ill. Rev. Stat. 1898, ch. 48, § 10, providing that, "For the payment of any judgment for damages and costs that may be recovered

against any person in consequence of the sale of intoxicating liquors under the preceding section, the real estate and personal property of such person, of every kind, except such as may be exempt from levy and sale upon judgment and execution, shall be liable; and such judgment shall be a lien upon such real estate until paid; and in case any person shall rent or lease to another any building or premises to be used or occupied, in whole or in part, for the sale of intoxicating liquors, or shall knowingly permit the same to be used or occupied, such building or premises so used or occupied shall be held liable for and may be sold to pay any such judgment against any person occupying such building or premises," it is held that the lien given here is not paramount to a prior mortgage upon the building; and that the liability declared in the latter part of the section applies only to owners or those having a rentable interest in the property, and not a contingent interest, such as that of a mortgagee. *Bell v. Cassem*, 158 Ill. 45 (41 N. E. Rep. 1089; 29 L. R. A. 571). In Nebraska it is held that a judgment in the district court against the vendor of land which is situate in the county in and for which the court is held, who has not, at the time of the recovery of the judgment, executed and delivered a deed for the land, or received all the purchase-money, is a lien upon the interest of the vendor in the land, viz., the unpaid purchase-money; and a levy of an execution issued upon such judgment on the land, and a sale thereunder, will pass to the purchaser the interest of the vendor. *Olander v. Tighe*, 43 Neb. 344 (61 N. W. Rep. 633). Under Wis. Rev. Stat., §§ 2077, 2078, which provides that where property is paid for by one person, and the title taken by another, the conveyance shall be presumed fraudulent as against the creditors of the party paying the consideration, it is held that such party acquires no title to which a judgment lien can attach. *Blackburn v. Lake Shore Traffic Co.*, 90 Wis. 362 (63 N. W. Rep. 289). Where a judgment for costs in a partition proceeding provides "that the parties hereto pay the same in accordance with their respective interests in the premises as found by the decree of this court, said sum to be a lien upon the lands in this decree," the amount is made a lien on all the lands, but no one owner can be required to pay more than an equal proportion of the

amount in view of the amount of land he owns and when he has paid that amount his part of the land will be free from the lien. *Habberton v. Habberton*, 156 Ill. 444 (41 N. E. Rep. 222).

Sec. 442. As to when a judgment lien takes effect. A judgment is not final so as to give it the qualities of a lien where the court retains full control of the litigation and where other action by the court remains to be taken in order to put an end to the controversy. *Crane v. Richardson*, Miss.

(18 So. Rep. 542). Under Ga. Acts 1889, p. 106, the lien of a judgment dates, as to *bona fide* conveyances by the debtor to third persons, only from the time the execution issuing thereon shall be entered upon the general execution docket, unless such entry is made within ten days from the date of the rendition of the judgment; and this is true, although such purchaser has knowledge of the judgment. *Bailey v. Bailey*, 93 Ga. 768 (21 S. E. Rep. 77). Under W. Va. Code, ch. 139, § 5, a judgment takes effect as a lien from the first day of the term of court in which it was rendered. *Dunn's Ex'rs v. Renick*, 40 W. Va. 349 (22 S. E. Rep. 66).

Sec. 443. Judgment lien—Writ of *elegit*. The common law writ of *elegit* is held not to exist in Utah. *Thompson v. Avery*, 11 Utah 214 (39 Pac. Rep. 829). The court say: "At common law no judgment lien existed in favor of the judgment creditor. The nearest approach to a modern judgment lien was found in St. 13 Edw. I., called the 'Statute of Westminster II.,' which created the writ of *elegit*. The only remedy offered the judgment creditor under this was the sequestration of the profits of the land by the writ of *levari facias*, or the possession of a moiety of the lands by writ of *elegit*, and in certain cases of the whole of it by extent. In all these cases the creditor held the land in trust until the debt was discharged by the receipt of rent and profits. 4 Kent Comm. 429; 3 Bl. Comm. 419."

Sec. 444. Judgment lien—How created by filing transcript—Construction of statute. Washington Code Civ. Proc., § 449, is as follows: "Within twenty days after the entry of any judgment for the recovery of money, the

clerk shall enter in said execution docket a statement of the judgment, and shall, at the request of the judgment creditor or his attorney, furnish a transcript of said judgment to the judgment creditor, and upon the filing of said transcript in the office of the county auditor, it shall be a lien upon all real estate of said judgment debtor in the county where such transcript shall be filed, for the period of five years from the time of the entry of said judgment. The lien shall attach from the day of the date of said judgment, if said transcript shall have been filed within the said twenty days; and in case an attachment has been levied upon any real estate, then from the levy of the attachment. The fees for making and filing such transcript shall be paid by the judgment creditor, and be taxed as costs against the judgment debtor, and be collected as other costs in the case. Said statements and transcripts shall contain: (1) The names, at length, of all the parties; (2) the date of the judgment, and against whom rendered; (3) the amount or nature of the judgment and costs; (4) an abstract of the costs of each party, and to whom belonging." Construing and applying this statute it is held that the filing of the transcript of the judgment itself is sufficient to create a lien; that the names of the parties need only appear as they appear in the judgment entry and the full Christian names are not necessary unless so set out in the judgment entry; and that the failure to include in the transcript the amount of the costs defeats only the lien of the costs. *Lamey v. Coffman*, 11 Wash. St. 301 (39 Pac. Rep. 682).

Sec. 445. Judgment of United States Court—Lien of—How acquired. The U. S. Stat., Act Aug. 1st, 1888, 25 Stat. 857, provides "that judgments and decrees rendered in a circuit or district court of the United States, within any state, shall be liens on property throughout such state, in the same manner, and to the same extent, and under the same conditions only as if such judgments and decrees had been rendered by a court of general jurisdiction of such state; provided, that whenever the laws of any state require a judgment or decree of a state court to be registered, recorded, docketed, indexed, or any other thing to be done in a particular manner, or in a certain office, or county, or parish in the state of Lou-

isiana, before a lien shall attach, this act shall be applicable therein whenever, and only whenever, the laws of such state shall authorize the judgments and decrees of the United States courts to be registered, recorded, docketed, indexed, or otherwise conformed to the rules and requirements relating to the judgments and decrees of the courts of the state." Under this statute it is held that it was necessary, in order to make a judgment of the United States circuit court a lien on the lands of the judgment debtor prior to actual levy, that a copy of the journal entry should be filed with the clerk of the district court of the county where the land was situated. *First Nat. Bank of Washington v. Clark*, 55 Kan. 219 (40 Pac. Rep. 270).

Sec. 446. Judgment lien—Decrees for alimony. A judgment or decree for alimony has only the lien of ordinary general judgments for money, as to any property of the defendant not specifically dealt with and described in the judgment or in the pleadings. A creditor of the husband, who, while a suit is pending against the latter for alimony, takes, *bona fide*, without fraud on his part, or any notice of a fraudulent object by the debtor, or any reasonable grounds of suspicion, a mortgage upon property not embraced in the pleadings of the pending suit, to secure a pre-existing debt, has priority over the lien of the judgment or decree for alimony subsequently rendered, the same as he would have over the lien of a judgment in favor of an ordinary creditor of the mortgagor, notwithstanding he knew when he took the mortgage that the suit for alimony was pending. The mere pendency of such a suit will not disable the defendant therein from making a *bona fide* mortgage or conveyance of unincumbered property, over which the court has not taken, nor been asked to take, any direct jurisdiction, in order to administer or secure it for application to the claim for alimony. *Coulter v. Lumpkin*, 94 Ga. 225 (21 S. E. Rep. 461).

Sec. 447. Penal judgment. It is held that a judgment for the recovery of a fine rendered in the United States court is not a lien upon real estate, unless made so by the statutes of the territory. *Thompson v. Avery*, 11 Utah 214 (89 Pac. Rep. 829). The court say: "Fines in criminal cases were

never protected by liens on lands at common law. They were neither included in the term 'debt,' used in Magna Charta, nor in the term 'obligation made to the king,' used in the statute of Henry VIII, above mentioned. 2 Bl. Comm. 464, 465, 879. Section 1041 of the Revised Statutes of the United States provides that fines or penalties in criminal cases may be enforced in like manner as judgments in civil cases. It is clear that in criminal cases judgments and fines in favor of the United States are to be enforced in the manner provided by the local or domestic statute."

Sec. 448. Judgment lien—Priority over unrecorded deed. The Ga. Stat. 1889, § 1, provides: "that deeds, mortgages and liens of all kinds, which are now required by law to be recorded in the office of the clerk of the superior court of each county within a specified time, shall, as against the interest of third parties, acting in good faith and without notice, who may have acquired a transfer or lien binding the same property, take effect only from the time they are filed for record in the clerk's office." Construing and applying this statute the supreme court say: "It is evident that the word 'lien,' as here used, has reference exclusively to liens acquired by contract. 'Lien' is a generic term, and includes both liens acquired by contract and by operation of law; but the context clearly indicates it is used here in its restricted sense, as applicable only to contractual liens. To say a judgment must be acquired in good faith and without notice, to be a valid lien upon the debtor's property, would be to engraft a new condition upon judgments. It matters not after judgment with what kind of faith a creditor was prompted to sue his debtor. It may be the creditor's motive was to obtain judgment, so that he might levy upon the home of his debtor, and turn him and his family into the streets to gratify a fiendish desire to see them in beggary and want; yet this would furnish no valid, legal reason to defeat the judgment. In other words, the motive which prompts a creditor to sue his claim to judgment is buried when a judgment is reared in his favor. The motive dies when the judgment is born. Again, to hold that a judgment acquired shall be a lien upon land conveyed in a prior unrecorded deed would be to hold that a

judgment shall be a lien upon other than the defendant's property. The sale of land, although the deed may not have been recorded, as between the parties to the contract, and, indeed, as to all the world, is a parting of the right, title, and ownership from the grantor to the grantee; and to hold that an after-acquired judgment against the grantor shall become a lien upon the property conveyed would be to add to judgments a quality never possessed heretofore, and to take from a deed a condition heretofore always recognized. We cannot think that the legislature intended to do these things, and we do not think the language used requires any such construction. There are many hundreds of unrecorded deeds in Georgia to-day upon which the purchase money of lands has been paid, and the grantors therein have subsequently become insolvent, and we believe it would be violative of every sense of right and justice, as well as of the law, to hold that the creditors of these grantors can subsequently obtain judgments and levy upon the property previously conveyed, and subject these homes to the satisfaction of their judgments so obtained. We therefore think that the judge below erred in the conclusion reached, 'that a recorded judgment against the grantor became, by operation of the act of 1889, a lien upon property previously conveyed in an unrecorded deed.' " *Donovan v. Simmons*, 96 Ga. 340 (22 S. E. Rep. 966).

Sec. 449. Judgment liens—Priority as between judgments—After-acquired real estate. In Iowa it is held that where judgments in favor of different parties and against the same defendant are recovered on the same day, the judgment creditor first issuing execution and levying upon the debtor's property acquires a prior lien thereon; that where judgments are held by different persons which are not a lien upon the property of the debtor, the judgment creditor who first issues execution and levies upon the property secures a prior lien; and that where the lien of different judgments attach to property at the same instant, as where the debtor acquires it subsequent to the rendition of all the judgments, then neither judgment has priority over the other. *Keeterson v. Tate*, Ia. (68 N. W. Rep. 850). In New Jersey it is essential that an execution should not only be issued, but actually levied

upon the lands of the defendant, in order to give a subsequent judgment creditor a preference over a prior judgment creditor who has failed to issue an execution upon his judgment. *Larison v. Dilts*, N. J. Eq. (82 Atl. Rep. 1059). The North Carolina Code, § 435, provides that a judgment, when docketed, becomes a lien on after-acquired lands of the debtor. Under this statute, in a well considered case, it is held by a divided court that where the debtor acquires lands subsequent to the docketing of judgments against him, such judgments do not have any priority on account of the date when docketed, but are to be satisfied *pro rata* out of such lands. *Moore v. Jordan*, 117 N. C. 86 (23 S. E. Rep. 259).

Sec. 450. Judgment liens—Cancellation of upon tender of amount. A tender does not extinguish the lien of a judgment, but if a judgment creditor wrongfully refuses a lawful tender of the amount of his judgment, and, while the judgment debtor still holds himself ready, able and willing to pay the amount, persists in using his judgment for the purpose of redeeming the land of his debtor from a sale on a prior lien, such use of the judgment is wholly in his own wrong; and the court will set aside the attempted redemption, and compel the judgment creditor to accept the tender and satisfaction of his judgment. *Rotsher v. Monahan*, 60 Minn. 186 (62 N. W. Rep. 263). The extinguishment of the debt extinguishes the lien. *Gilpen v. Leksell*, 54 Kan. 674 (39 Pac. Rep. 176).

Sec. 451. Revival of judgment liens. In Pennsylvania it is held that the lien of a judgment on a farm which defendant owned and lived on when judgment was entered is continued by a revival of the judgment by an amicable *scire facias*, signed by defendant alone, the record title and the possession remaining the same, notwithstanding a secret conveyance by defendant to his wife; and subsequent notice of the conveyance does not affect the lien, so that another proceeding for revival, based on the original judgment, against defendant and his wife, is not only unnecessary, but unauthorized. *Lyon v. Cleveland*, 170 Pa. St. 611 (83 Atl. Rep. 143; 50 Am. St. Rep. 782; 80 L. R. A. 400). Where a dormant judgment is revived under § 5368, Ohio Rev. Stat., it does not, by virtue of its revivor, become a lien on the lands

acquired by the debtor after its original recovery, unless a levy is made thereon either before it became dormant or after its revivor. Where made after the judgment is revived, the lien dates from the time the land is seised in execution, and not from the time of the revivor. *Smith v. Hogg*, 52 O. St. 527 (40 N. E. Rep. 406).

Sec. 452. Loss of judgment lien. S. C. Code, 1882, § 810, provides that "final judgments entered in any court of record in this state subsequent to the 25th day of November, 1878, shall constitute a lien upon the real estate of the judgment debtor in the counties where the same are entered, for a period of ten years from the date of entry of such judgments: * * * provided, however, that the plaintiff in such judgments may at any time in three years after the active energy has expired revive the judgment with like lien as in the original, for a like period, by service of a summons on the debtor, as provided by law, requiring him to show cause, if any he can, at the next term of the court for his county, why such judgment should not be revived; and if no good cause be shown to the contrary, then it shall be decreed that such judgment is revived according to the force, form and effect of the former recovery." Under this statute, where a judgment which was senior to a mortgage and to other judgments had lost its active energy by lapse of time and during the time within which it could have been revived, execution was issued on a junior judgment and the land sold and subsequently the senior judgment was revived, it was held that the lien under the senior judgment was lost, and the purchaser could not claim title by reference to the senior judgment so as to cut off the lien of the mortgage. *Kaminsky v. Trantham*, S. C. (23 S. E. Rep. 132). If the same plaintiff having two judgment liens on the same land, he may sell under the junior without releasing or affecting in any way the senior, unless it can be shown that he was guilty of some fraud upon the purchaser, as by misleading him in relation to the existence of the senior judgment. The sale of lands under the junior judgment passes title subject to all prior liens. The fact that the owner of both of the liens bids on the property at such sale is not a

representation that the rights conferred by the senior lien are waived. *Matless v. Sundin*, Ia. (62 N. W. Rep. 662).

Sec. 453. Lis pendens. Actual knowledge of a decree foreclosing a lien dispenses with the necessity of recording a *lis pendens* of the same lien. *Frank v. Jenkins*, 11 Wash. St. 611 (40 Pac. Rep. 220). A *lis pendens* exists only during the pendency of an action and the dismissal of the action defeats the lien as to the grantee of the holder of the legal title without actual notice. *Karr v. Burns*, 1 Kan. App. 232 (40 Pac. Rep. 1087). *Lis pendens* is not notice to a subsequent purchaser, not a party to the suit, of lands not mentioned in the complaint but included in the judgment in pursuance to an understanding between the parties to the suit. *Oliphant v. Burns*, 146 N. Y. 218 (40 N. E. Rep. 980). The pendency of a bill in equity brought by the assignee of a bond for titles against both the maker and the assignor, to compel the maker to convey certain described premises pursuant to the bond, and to set aside a conveyance which he had made to the assignor subsequent to the assignment, the bill, besides praying for this specific relief, praying also for general relief, operated as notice to all the world of the plaintiff's equity; and the doctrine of *lis pendens*, properly understood and applied, would prevent a stranger from dealing with either of the defendants in the bill, after it was filed and before final decree, so as to acquire a title to the premises from either of them capable of withstanding the force of the decree or frustrating its full legal effect. *Faulkner v. Vickers*, 94 Ga. 581 (21 S. E. Rep. 283).

Sec. 454. As to what a lis pendens is notice of—Amendments. The title of a purchaser in good faith from the vendee in a sale with a power of redemption after the sale has become absolute, by reason of the nonexercise of the right of redemption, is secure against an attack from the original vendor or his creditors, on the ground that the "sale with redemption" was really a contract for security which did not shift the ownership. The purchaser is not affected by secret equities, unknown to him, or not disclosed by the record. Though the knowledge which the purchaser of a piece of property has of the pendency at the time of his purchase of a

revocatory action against his vendor to have his title set aside for fraud may affect him, should that action terminate in favor of the plaintiff, but it does not, if it terminate in favor of the defendant, charge him with general notice that the title is subject to attack on other grounds. *Broussard v. West*, 47 La. 1033 (17 So. Rep. 476). The essence of the continuance of a *lis pendens* is that the object, subject-matter, ground of relief, and parties should remain unchanged, except upon a devolution of the title from the complainant. An amendment which does not change either of these, but is a mere specification of additional matters of proof of the ground of recovery, *i. e.*, fraud, does not make a new suit, even though the matter so set up becomes in the end the ground of recovery. *Turner v. Houpt*, 53 N. J. Eq. 526 (33 Atl. Rep. 28).

Sec. 455. Extent to which the *lis pendens* binds subsequent purchasers. It is held by a divided court that where a mortgagee commenced a foreclosure after a levy upon the lands of an execution issued upon a judgment junior to the mortgage, the execution plaintiff being made a party to such foreclosure and a *lis pendens* properly filed, the purchaser at the execution sale, had pursuant to said levy, having also been made a party to the foreclosure proceedings, cannot divest the lien of the mortgage by claiming under a senior judgment to the satisfaction of which the proceeds of the execution sale were applied. *Baum v. Trantham*, S. C. (28 S. E. Rep. 54). The New York statute, Code Civ. Proc., § 1671, provides that the holder of an incumbrance taken after the filing of the notice of *lis pendens* against his grantor, is bound by all the proceedings in the action after the filing of such notice, to the same extent as if he was a party. Construing and applying this statute it is held that a mortgagee who takes his mortgage after the filing of the *lis pendens* and whose right as such is properly found in the decree, is not liable on account of the judgment, for costs rendered in favor of the plaintiff against the mortgagor on the ground that the judgment did not become a lien on the land until the filing of a transcript with the county clerk, which did not occur until after the execution of the mortgage. *Crocker v. Lewis*, 144 N. Y. 140 (39 N. E. Rep. 1).

Sec. 456. Federal court proceedings as lis pendens—Lien of judgment in state courts—Practice. Section 5056 of the Ohio Rev. Stat., which provides that “when any part of the real property, the subject-matter of an action, is situate in any county or counties other than the one in which the action is brought a certified copy of the judgment in such action must be recorded in the recorder’s office of such other county or counties before it shall operate therein as notice so as to charge third persons,” or affect interests acquired by them in the property not situate in the county where the action was brought, relates to actions and judgments in the state courts, and not to those in the courts of the United States. A suit brought in a federal court to foreclose a mortgage on the property of a railroad corporation operates as constructive notice throughout the district, and all persons acquiring an interest in or lien on any part of the property during the pendency of the suit will be bound by the decree and sale made thereunder. The purchaser will take the property discharged from all such liens and interests, though the persons obtaining them be not parties to the suit. They must seek satisfaction from the proceeds of the sale, to reach which they should become parties, and bring their claims to attention of the court by appropriate pleadings. But a judgment recovered in a state court against the railroad company, prior to the commencement of the foreclosure suit, by a creditor who was made a party, remains unaffected by the decree and sale. Such judgment becomes a lien on the real property owned by the company at the time of its recovery, in the county where rendered, including lands acquired for the roadway, right of way, depots, and other purposes of the company, and continues to be so against the property in the hands of the purchaser at the foreclosure sale. While in such case the judgment creditor may not, except as authorized by statute, sell on execution the property to which his lien attaches, either where it is part only of the corporate property, and is necessary, in connection with the balance of the property, to enable the corporation to accomplish the purposes of its creation, and discharge the duties it has assumed towards the public, or where the sale would materially impair the uses and value of the balance of the property, he may, by a proceeding in equity to which all

persons in interest are made parties, enforce his lien by subjecting the whole of the property to resale, and obtaining a proper application of the proceeds. In a proceeding for that purpose, the purchaser at the foreclosure may, if necessary for his protection, be subrogated to the rights of the mortgagee, to the extent of the purchase-money paid; and the proceeds of the resale must first be applied to the satisfaction of incumbrances superior to the lien of the judgment creditor, if any there be, including those set up on the foreclosure suit, and if nothing then remain for the judgment creditor he cannot recover costs. *Stewart v. Wheeling & L. E. Ry. Co.*, 58 O. St. 151 (41 N. E. Rep. 247; 29 L. R. A. 438).

Sec. 457. Attorney's lien — Attachment liens. In a foreclosure proceeding the attorney's fee may be made a lien upon the property. *Watson v. Sawyer*, 12 Wash. St. 85 (40 Pac. Rep. 413). A lien in favor of the attorney upon property in the hands of the adverse party belonging to his client, can only exist from the time of giving notice to such party. *Sheedy v. McMurtry*, 44 Neb. 499 (63 N. W. Rep. 21). An attachment lien is not lost by a mathematical error made by an officer of the court in computing the amount due the plaintiff under his affidavit. *Lee v. Smyser*, 96 Ky. 369 (29 S. W. Rep. 27). An attachment lien can only be acquired by a strict compliance with the statute. Mo. Rev. Stat., 1889, § 543, subd. 3, construed. *Bryant v. Duffy*, 128 Mo. 18 (30 S. W. Rep. 317; 49 Am. St. Rep. 536). The claim of an attaching resident creditor will be preferred to that of an assignee who is a resident of another state and who claims under an assignment for the benefit of creditors and subsequently to one who claims under such assignee by virtue of a *bona fide* purchase subsequent to the levying of the attachment. *Hughes v. Lambertville Elec. L. H. & P. Co.*, 53 N. J. Eq. 435 (32 Atl. Rep. 69). It is held that as against the rights of the grantee in an unrecorded deed, an attaching creditor who has notice of such deed before the completion of his levy and the perfection of his attachment by proper warrant is not entitled to priority. *Merchants' Bldg. & L. Ass'n v. Barber*, N. J. Eq. (30 Atl. Rep. 865).

Sec. 458. Equitable liens. Where a court appoints a trustee for the investment of money arising from the sale of certain land, and conveys the land to her, as purchaser, and directs the investment of the fund for the benefit of her *cestui que trust*, an equitable lien is created on the land in favor of the *cestui que trust*, which is superior to the claims of the general creditors of the trustee. *Finnell v. Higginbotham*, Ky. (29 S. W. Rep. 740). A promissory note which provides that land described therein is bound for its payment may be treated as an equitable mortgage. *Smith v. Hiles-Carver Co.*, 107 Ala. 272 (18 So. Rep. 87). A person who pays purchase-money due from the wife of an insane person to her vendor for a part of the lands included in the homestead, and takes a conveyance of the legal title from such vendor to himself, to secure the amount so paid, acquires a valid lien for the money advanced, and he may mortgage the land to a third person to the extent of his interest. *New England L. & T. Co. v. Spitler*, 54 Kan. 560 (38 Pac. Rep. 799). It is held that if an administrator mortgage real estate of the decedent and with the proceeds purchase the widow's dower interest for the heirs, although the mortgage is void the debt which it secures may be declared a lien on the dower interest. *Campbell v. Smith*, 103 Mich. 427 (61 N. W. Rep. 654). Equity will not enforce a lien upon lands of a testator as against his creditors for money advanced for making improvements on an agreement with the testator to devise the land to the party making the advancement. *Beach v. Bullock*, R. I. (32 Atl. Rep. 165). Where land is sold by a master commissioner and the price paid to him, a subsequent loan of a part thereof to the purchaser being made under an order of court, the master commissioner taking the purchaser's indorsed note therefor, does not give any lien. *Rickets v. Hamilton*, Ky. (29 S. W. Rep. 786). A wife advancing money to her husband for the purpose of improving his real estate, as an investment, may enforce an equitable lien therefor. *Stramann v. Scheeren*, 7 Colo. App. 1 (42 Pac. Rep. 191).

Sec. 459. Lien of legacies. It is held that the blending of the real and personal estate in the residuary clause of a will binds the real estate for the payment of the legacies by

implication, on the ground that the residue and remainder can only be ascertained after the payment of the debts, legacies and expenses. *In re Weiler's Estate*, 169 Pa. St. 66 (82 Atl. Rep. 101). In Maryland it is held that where a testator gives legacies, and then gives "the remainder of his estate, real and personal," or "the balance of his estate," or "the rest, residue and remainder of my estate," these and other like terms are not in themselves sufficient to show an intention on the part of the testator to charge the real estate with the payment of legacies. *Pearson v. Wartman*, 80 Md. 528 (81 Atl. Rep. 446). In a recent case the supreme court of Pennsylvania say: "The question whether an annuity is a charge upon real estate is one of intention. If the actual intention appears, no form of words is necessary. Unless technical words by which rules of property are fixed have been used, the intention is to be gathered from the whole will. A charge cannot be created by the mere gift of an annuity, but it may be created without express words, and by implication from the whole will that such was the intention. As to this rule, all our cases agree, and any apparent departure from it in the decisions will be found to have resulted from the difficulty of applying the general rule to the facts of a particular case. In *Ripple v. Ripple*, 1 Rawle 886, Chief Justice Gibson said: 'A legacy may be charged on land by implication. No form of words is necessary to produce the effect, and, when the intention is manifest, courts are bound to carry it into execution.' In support of this he cites *Nichols v. Postlethwaite*, 2 Dall. 181; *Hassanclever v. Tucker*, 2 Bin. 526; *Whitman v. Norton*, 6 Bin. 395; *Dobbins v. Stevens*, 17 Serg. & R. 13. This has since been followed in numerous cases, among them *Gilbert's Appeal*, 85 Pa. St. 347, in which it was said by Woodward, J., 'While, in order to make legacies a charge upon land, it must be found that such was the testator's intention, still it is not necessary that its ascertainment should rest upon direct expression.' " *Dickerman v. Eddinger*, 168 Pa. St. 240 (82 Atl. Rep. 41).

Sec. 460. Priority of different kinds of liens. In construing Ind. Rev. Stat., 1894, § 4290, which makes assessments for street improvements a lien on property assessed, and gives them "precedence over all other liens, excepting

taxes," it is held that the latest of such liens has priority over all other liens of like nature previously acquired. *Burke v. Lukens*, 12 Ind. App. 648 (40 N. E. Rep. 641). Where land intended to be included in a mortgage is omitted by mistake, and a transcript of a judgment against the mortgagor is subsequently filed in the office of the clerk of the district court in the proper county, the lien of the judgment creditor is subject to the equity of the mortgage. *Chadron L. & B. Ass'n v. Hamilton*, 45 Neb. 369 (68 N. W. Rep. 808). Where two tracts of land are alike subject to a lien in the nature of a charge laid on them by will, the purchaser of one of the tracts is entitled to have the other first resorted to for the satisfaction of the charge. *In re Fessenden's Estate*, 170 Pa. St. 631 (33 Atl. Rep. 135). For cases which depend upon particular facts and illustrate the right to have priority of lien, see *McFarland v. Moomaw*, Va. (22 S. E. Rep. 865).

MARRIED WOMEN.

EPITOME OF CASES.

Sec. 461. Contracts and conveyances. A married woman who has absolute power of disposition may delegate such power to trustees. *Dillard v. Dillard's Executors*, Va. (21 S. W. Rep. 669). She may bind herself by a contract to pay rent. *Rogers v. Coy*, 164 Mass. 391 (41 N. E. Rep. 652). Where a married woman performs her part of the contract she may enforce performance against the other party, although she could not have been compelled to perform her part of the agreement. *Sanguinett v. Webster*, 127 Mo. 32 (29 S. W. Rep. 698). Although the contract may not be enforceable against her, if she contract to purchase real estate, and fail to pay for the same, it may be sold for the purchase money, or any part of it, that may remain unpaid. *Blantz v. Bain*, 95 Tenn. 87 (31 S. W. Rep. 159). In such a case she is not liable to a personal judgment nor can a provision for attorney's fees in the note given for the purchase money be

enforced against her. *Snodgrass v. Hyder*, 95 Tenn. 568 (82 S. W. Rep. 764). A deed purporting to be an absolute conveyance of lands belonging to a married woman will not be construed as a mere release of dower because her husband's name appears first therein. *Lake Erie & W. R. Co. v. Whitham*, 155 Ill. 514 (40 N. E. Rep. 1014; 28 L. R. A. 612; 46 Am. St. Rep. 855). A married woman who makes a simulated sale of her property, to serve the purposes of her husband, the title of her vendee being recorded, is bound by his sale or mortgage to one acquiring in good faith and for value, on the faith of the recorded title. *Thompson v. Whitbeck*, 47 La. 49 (16 So. Rep. 570). Where an abandoned wife conveys land without obtaining permission from the court, as provided for by Ky. Gen. Stat., p. 723, ch. 52, she is not entitled to rescind the deed a long time afterwards, on account of her coverture, without returning the consideration. *Gray v. Shaw*, Ky. (80 S. W. Rep. 402). Where a statute (Mo. Rev. Stat. 1889, § 6864) provides that "a married woman shall be deemed a *feme sole* so far as to enable her to carry on and transact business on her own account, to contract and be contracted with, to sue and be sued," such statute does not authorize her to convey land without her husband joining, where the statute of conveyances (§ 2896) requires the joint deed of husband and wife. *Brown v. Dressler*, 125 Mo. 589 (29 S. W. Rep. 13).

Sec. 462. Contracts of suretyship. Where she makes a valid contract of suretyship she is entitled to all the rights of surety. *Filler v. Tyler*, 91 Va. 458 (22 S. E. Rep. 235). Notice to the agent of a loan company that money borrowed from it and secured by a married woman's mortgage was for her husband, and not for herself, is notice to such company. *American Freehold L. Mort. Co. v. Felder*, 44 S. C. 478 (22 S. E. Rep. 598). A statute (Ala. Code, § 2849; Ballards' Annual, Vol. 2, § 381) providing that "a wife shall not directly or indirectly become the surety for the husband," prohibits her mortgaging her real estate to one who is surety for her husband, or cosurety with him, on a debt for which he may be held liable as a principal. *McNeil v. Davis*, 105 Ala. 657 (17 So. Rep. 101). Under Cal. Civ. Code, § 2844, a

wife's mortgage of her separate property, without any new consideration, to secure an antecedent debt of her husband is not enforceable. *Chaffee v. Browne*, 109 Cal. 211 (41 Pac. Rep. 1028). In West Virginia she may bind her separate estate by a contract as surety for her husband. *Williamson v. Cline*, 40 W. Va. 194 (20 S. E. Rep. 917); and the same rule prevails in Nebraska. *Watts v. Gantt*, 42 Neb. 869 (61 N. W. Rep. 104).

Sec. 463. Estoppels applied to married women. The mere fact that she knows that her conveyance is invalid, and remains silent, does not estop her from asserting such invalidity. *Coates v. Gordon*, Ind. (41 N. E. Rep. 1044). Where a husband makes a lease of his wife's land for one year with the privilege to the tenant of a further term of four years, which lease is void because not assented to in writing by the wife, she is not estopped to question its validity by receiving the share of the farm products reserved by the lease for the first year. *Williams v. Mershon*, 57 N. J. L. 242 (30 Atl. Rep. 619). Under Ala. Code, § 1899, a wife joining her husband in a conveyance of his land is not bound by covenants in such deed, and is not estopped to assert a paramount lien in her own favor on the land conveyed. *Curry v. Amer. F. L. Mort. Co.*, 107 Ala. 429 (18 So. Rep. 828). Under Ind. Rev. Stat. 1894, § 6962, a married woman is bound by an estoppel *in pais*. *Le Coil v. Armstrong L. H. Co.*, 140 Ind. 256 (39 N. E. Rep. 922.)

Sec. 464. Equities of married women as against creditors of the husband. She cannot assert her equitable title to lands, the legal title to which stands in her husband's name, to the injury of persons holding claims against him for improvements erected thereon by them in good faith. *Le Coil v. Armstrong L. H. Co.*, 140 Ind. 256 (39 N. E. Rep. 922). A court of equity will not at the instance of the husband's creditors attempt to charge a wife's separate property with alleged improvements put thereon by the skill and labor of the husband, unless the evidence establishes the existence, and at least the approximate amount, of such improvements. *Board of Education v. Mitchell*, 40 W. Va. 481 (21 S. E. Rep. 1017).

Sec. 465. Miscellaneous notes. Where a husband employs his wife and pays her wages which he would otherwise be required to pay to some other employee, equity will not deprive her of the money, nor of property in which she has invested it. *Sing Bow v. Sing Bow*, N. J. Eq. (30 Atl. Rep. 867). Citing, *Stall v. Fulton*, 30 N. J. L. 430; *Woodruff v. Clark*, 42 N. J. L. 198; *Skillman v. Skillman*, 13 N. J. Eq. 403, at page 407; 15 N. J. Eq. 479; 82 Am. Dec. 279; *Peterson v. Mulford*, 36 N. J. L. 481; *Quidort's Adm'r v. Pergeaux*, 18 N. J. Eq. 472; *Slanning v. Style*, 3 P. Wms. 337; *Savage v. O'Neil*, 44 N. Y. 298-302; *Raybold v. Raybold*, 20 Pa. St. 308; *Merrill v. Smith*, 37 Me. 394; *Henderson v. Warmack*, 27 Miss. 830; *Farley v. Blood*, 10 Fost. (N. H.) 354. Where a wife purchases land in her own name and with her own money it will be presumed to be her separate property. *Webster v. Thorndyke*, 11 Wash. St. 390 (39 Pac. Rep. 677). She may bind herself by consenting that judgment be rendered against her. *Truesdail v. McCormick*, 126 Mo. 39 (28 S. W. Rep. 885). Where a judgment in an action of ejectment is obtained against a married woman and her husband for costs, such judgment cannot be enforced by suit in equity against the separate estate of the wife. *Thorn v. Sprouse*, 39 W. Va. 706 (20 S. E. Rep. 676).

SEPARATE REAL ESTATE.

[In Vol. 2, §§ 381-428; Vol. 3, §§ 470-493, will be found a compilation of the statutes and decisions of the several states and territories on the subject of Separate Real Estate of Married Women. Below we give such amendments, changes and additional constructions as have been made.]

Sec. 466. Alabama. (See Vol. 2, § 381; Vol. 3, § 470.) Ala. Pamph. Acts 1880-81, p. 267, applied—petition by a married woman to act as *feme sole*. *Pollard v. Amer. Freehold L. M. Co.*, 103 Ala. 289 (16 So. Rep. 801). Code, § 2349, applied. *McNeil v. Davis*, 105 Ala. 657 (17 So. Rep. 101). The provision of the constitution (Art. 10, § 6) abrogates the common law right of a married woman to disaffirm a purchase of land. *McAnally v. Heflin*, 105 Ala. 525 (17 So. Rep. 87). The effect of the statute is to abrogate the legal title of the husband, and invest the wife with the equitable and legal estate, as between the husband and the wife, but it cannot operate so as to affect intervening rights. *Gunn v. Hardy*, 107 Ala. 609 (18 So. Rep. 284).

Sec. 467. Arkansas. (See Vol. 2, § 383; Vol. 3, § 471.) "From and after the passage of this act it shall be lawful for married women to make executory contracts and execute letters of attorney containing a power to convey real estate as agents or attorneys, which shall have the same force and effect as those made by unmarried persons." (Approved Mar. 19, 1895.) Acts 1895, p. 58.

Sec. 468. Connecticut. (See Vol. 2, § 386; Vol. 3, § 474.) For act validating conveyances to husband, and conveyances without his joinder, see Pub. Laws, 1895, p. 706, § 12.

Sec. 469. Florida. (See Vol. 2, § 389; Vol. 3, § 475.) Under the constitution a married woman's separate real or personal statutory property may be charged in equity and sold, or the uses, rents, and profits thereof sequestered, for the price of any property purchased by her, whether for material used, with her knowledge or assent, in the construction of buildings, or repairs or improvements, upon her property or not. When it does not appear whether the real property of a married woman is her equitable separate estate or her separate statutory property, the court cannot deal with it, in so far as ordering its sale for the payment of a debt is concerned. *Halle v. Einstein*, 34 Fla. 589 (16 So. Rep. 554); *Halle v. Meinhard*, 34 Fla. 607 (16 So. Rep. 559). Under the Florida statute, 1885, Art. 11, § 2, it is held that a married woman's statutory real estate is chargeable in equity with the price of any property purchased by her. *Id.*

Sec. 470. Georgia. (See Vol. 2, § 390; Vol. 3, § 476.) Any indirect arrangement by which she pledges her estate as security for the debt of another is within the statute which prohibits her from making contracts of suretyship. *National Bank of Athens v. Carlton*, 96 Ga. 469 (23 S. E. Rep. 388).

Sec. 471. Illinois. (See Vol. 2, § 392; Vol. 3, § 478.) Under Act March 27, 1869, enabling her to convey her land by "joining her husband in the execution" of the deed, it is held that a deed signed by her and to which she affixes her husband's signature, no proof being made that the latter act is without his consent or direction, is sufficient to pass title. *Dean v. Shreve*, 155 Ill. 650 (40 N. E. Rep. 294).

Sec. 472. Indiana. (See Vol. 2, § 393; Vol. 3, § 479.) She cannot pledge her personal property to secure the debt of another. *Goff v. Hankins*, 11 Ind. App. 456 (39 N. E. Rep. 294). Her mortgage of land held with her husband as tenants by entireties to secure his debt is void. *Coates v. Gordon*, Ind. (41 N. E. Rep. 1044). She can not by her conveyance alone give rights to oil and gas in her land, with privilege to dig wells, lay pipes, etc., for the purpose of removing them. *Columbian Oil Co. v. Blake*, 13 Ind. App. 680 (42 N. E. Rep. 234). Where she executes a mortgage on her separate real estate to secure the payment of another's debt, a thing prohibited by the statute, she is not estopped by the recitals therein from showing that the conveyance is a contract of suretyship. *Cole v. Temple*, 142 Ind. 498 (41 N. E. Rep. 942).

Sec. 473. Iowa. (See Vol. 2, § 394.) Particular facts held to give a wife a separate estate in lands. *Hollenbeak v. Peck*, Ia. (64 N. W. Rep. 780).

Sec. 474. Kentucky. (See Vol. 2, § 396; Vol. 3, § 480.) Her mortgage to secure the price of land purchased by her and her husband is void. *Davis v. Page*, Ky. (32 S. W. Rep. 257). Her deed unacknowledged as required by the statute, is void. *Louisville, St. L. & T. Ry. Co. v. Stephens*, 96 Ky. 401 (29 S. W. Rep. 14); *Louisville, St. L. & T. Ry. Co. v. Wilhite*, Ky. (29 S. W. Rep. 326).

Sec. 475. Louisiana. (See Vol. 2, § 397.) The only test of the paraphernality of the title of a married woman, during the existence of the community, is to be found in proof of the existence, origin, and investment of her paraphernal funds, under her separate administration and control. *Rouyer v. Carroll*, 47 La. An. 768 (17 So. Rep. 292). Where a husband permanently deserts his wife and she buys property with her paraphernal funds, it becomes her separate property. *Reinach v. Levy*, 47 La. 963 (17 So. Rep. 426). The wife may, after the death of the husband, ratify the act by which she had bound herself and her property for his debt during his lifetime. The nullity of such act is only absolute in this sense, that she cannot ratify it as long as she is under marital influence. The ratification may be express or tacit. *Brownson v. Weeks*, 47 La. 1042 (17 So. Rep. 489).

Sec. 476. Maryland. (See Vol. 2, § 399; Vol. 3, § 481.) She cannot assign a mortgage executed to her without her husband joining. *Griffin v. Blandin*, 80 Md. 130 (30 Atl. Rep. 624). A married woman trading as a *feme sole* under Code, Art. 56, § 36, is not subject to the provisions of Code, Art. 47, § 23, relating to involuntary insolvency. *Clark v. Manko*, 80 Md. 78 (30 Atl. Rep. 621). Under Acts 1872, ch. 270, her contract to convey land executed jointly by herself and husband may be specifically enforced. *Klecka v. Ziegler*, 81 Md. 482 (32 Atl. Rep. 241).

Sec. 477. Minnesota. (See Vol. 2, § 402.) "In all cases where a married woman has heretofore conveyed real estate belonging to her by deed legally witnessed, sealed, and acknowledged, but not signed by her husband, and he afterwards conveys the same real estate by deed legally witnessed, sealed and acknowledged to grantee named in the wife's deed, or to his grantees, the conveyance shall be valid and effectual to pass the title to such grantee as if the conveyance had been made by a single instrument, executed by wife and husband jointly." Gen. Laws, 1895. p. 496.

Sec. 478. Mississippi. (See Vol. 2, § 403.) Her contract to charge her separate estate will be enforced although executed in another state by the laws of which it would not have that effect. *Read v. Brewer*, Miss. (16 So. Rep. 350).

Sec. 479. Missouri. (See Vol. 2, § 404; Vol. 3, § 483.) Gen. Stat. § 6869 (Ballards' Annual, Vol. 2, § 404) is amended by adding the

following: "Provided, that before any such executions shall be levied upon any separate estate of a married woman, she shall have been made party to the action, and all questions involved shall have been therein determined, and shall be recited in the judgment and execution thereon." Laws 1895, p. 222. Rev. Stat. 1889, § 6864, does not authorize her to convey or mortgage her real estate without her husband joining. Such a conveyance is good as a contract to convey or as an equitable mortgage. *Brown v. Dressler*, 125 Mo. 589 (29 S. W. Rep. 13). The statutes enlarging the rights of married women do not divest the husband of the vested right to the possession of her real estate. *Arnold v. Willis*, 128 Mo. 145 (30 S. W. Rep. 517). She cannot appoint an agent in regard to her property not held as her equitable separate estate. *Mead v. Spaulding*, 94 Mo. 48 (6 S. W. Rep. 384), overruled. *Macfarland v. Heim*, 127 Mo. 327 (29 S. W. Rep. 1030; 48 Am. St. Rep. 629).

Sec. 480. Montana. (See Vol. 2, § 405.) Under Act, March 3, 1887, she may retain her property, as against her husband's creditors, without having first filed a list thereof as required by Act 1872. *Lambrecht v. Patten*, 15 Mont. 260 (38 Pac. Rep. 1063).

Sec. 481. Nebraska. (See Vol. 2, § 406; Vol. 3, § 484.) She can mortgage her separate estate to secure the individual debt of her husband. *Watts v. Gantt*, 42 Neb. 869 (61 N. W. Rep. 104).

Sec. 482. New Jersey. (See Vol. 2, § 409.) "Any married woman shall after the passage of this act, have the right to bind herself by contract with any person in the same manner and to the same extent as though she were unmarried, which contracts shall be legal and obligatory, and may be enforced in law or in equity, by or against such married woman, in her own name, apart from her husband; *provided*, that nothing herein shall enable such married woman to become an accommodation endorser, guarantor or surety, nor shall she be liable on any promise to pay the debt, or answer for the default or liability of any other person; provided further, however, that if, on the faith of any indorsement, contract of guaranty or suretyship, promise to pay the debt of, to answer for the default or liability of any other person, any married woman obtains directly or indirectly, any money, property or other thing of value, for her own use, or for the use, benefit or advantage of her separate estate, she shall be liable thereon as though she were unmarried, any thing herein contained to the contrary notwithstanding." Gen. Stat. p. 2017, § 26; Pub. Laws, 1895, p. 821.

Sec. 483. New York. (See Vol. 2, § 411.) "Property real or personal, now owned by a married woman, or hereafter owned by a married woman at the time of her marriage, or acquired by her as prescribed in this chapter, and the rents, issues, proceeds and profits thereof, continues to be her sole and separate property as if she were unmarried, and is not subject to her husband's control or disposal nor liable for his debts." Laws, 1896, ch. 272, § 20. "A married woman has all the rights

in respect to property, real or personal, and the acquisition, use, enjoyment and disposition thereof, and to make contracts in respect thereto with any person including her husband, and to carry on any business, trade or occupation, and to exercise all powers and enjoy all rights in respect thereto and in respect of her contracts and be liable on such contracts as if she were unmarried; but a husband and wife can not contract to alter or dissolve the marriage or to relieve the husband from his liability to support his wife." *Id.* § 21. "A contract made by a married woman does not bind her husband or his property." *Id.* § 25.

A husband and wife may convey to each other, and have partition of lands held by them, including lands held as tenants by entireties. *Id.* § 26.

Sec. 484. North Carolina. (See Vol. 2, § 412; Vol. 3, § 485.) Her separate estate cannot be charged for goods sold to her husband. *Witz v. Gray*, 116 N. C. 48 (20 S. E. Rep. 1019). She may mortgage her land to secure the debt of her husband. *In re Freeman*, 116 N. C. 199 (21 S. E. Rep. 110). The provision of the constitution applies only to cases where the marriage has been contracted or the property acquired since its adoption. *Cobb v. Raspberry*, 116 N. C. 137 (21 S. E. Rep. 176); *Kirby v. Boyette*, 116 N. C. 165 (21 S. E. Rep. 697); *Shaffer v. Bledsoe*, 117 N. C. 144 (23 S. E. Rep. 169). Under act of 1849 (Code, § 1840), the husband may sell, lease, or mortgage the rents and profits of his wife's land, without her consent, and this statute applies to all cases which do not come under the provision of the constitution of 1868. *Cobb v. Raspberry*, 116 N. C. 137 (21 S. E. Rep. 176). As to land acquired prior to the constitution of 1868, her power of disposition is limited to the mode and manner pointed out in the instrument. *Kirby v. Boyette*, 116 N. C. 165 (21 S. E. Rep. 697).

Sec. 485. Pennsylvania. (See Vol. 2, § 416; Vol. 3, § 487.) Under Act June 3, 1887, she is not liable upon her contracts as accommodation endorser, guarantor or surety. *Patrick v. Smith*, 165 Pa. St. 526 (30 Atl. Rep. 1044). In the absence of a power in the will creating the same she cannot devise a trust estate for her separate use. *In re Steinmetz's Estate*, 168 Pa. 175 (31 Atl. Rep. 1092).

Sec. 486. Rhode Island. (See Vol. 2, § 417; Vol. 3, § 488.) "A married woman may make any contract whatsoever the same as if she were single and unmarried, and with the same rights and liabilities." Gen. Laws, ch. 194, §§ 4 and 13 expressly repealed. Laws 1896, ch. 335. Under Pub. Laws 1893, ch. 1204, she may sue her husband directly. *Taylor v. Slater*, 18 R. I. 797 (31 Atl. Rep. 165). Under Pub. Stat. ch. 166, § 4, she is liable upon her covenants relating to her land. *Schultze v. Hill*, R. I. (31 Atl. Rep. 165).

Sec. 487. South Carolina. (See Vol. 2, § 418; Vol. 3, § 489.) The intention to convey or charge her separate estate required by the act 1887, need not be expressed on the face of the instrument if it

was in fact executed by her for the benefit of her separate estate. *Gibson v. Hutchins*, 43 S. C. 287 (21 S. E. Rep. 250). Under Gen. Stat. § 2037, she may mortgage her separate real estate. *Kuker v. McIntyre*, 43 S. C. 117 (20 S. E. Rep. 976). She cannot mortgage her land and secure money for the benefit of her husband, provided the lender has knowledge of such intended use. *American Freehold L. Mort. Co. v. Felder*, 44 S. C. 478 (22 S. E. Rep. 598).

Sec. 488. Tennessee. (See Vol. 2, § 420; Vol. 3, § 490.) Particular facts held insufficient to charge her separate estate with the payment of a note. *Wallace v. Goodlet*, 93 Tenn. 598 (30 S. W. Rep. 27). Land purchased with money which her husband has permitted her to acquire and held and treated as her own, becomes her separate real estate. *Snodgrass v. Hyder*, 95 Tenn. 568 (32 S. W. Rep. 764). As to her liability for purchase money, see *Snodgrass v. Hyder*, 95 Tenn. 568 (32 S. W. Rep. 764). Particular case in which separate property conveyed in trust for a married woman, and its income, were held to be beyond her power to charge for debts. *Bank of Shelby v. James*, 95 Tenn. 8 (30 S. W. Rep. 1038).

Sec. 489. Texas. (See Vol. 2, § 421; Vol. 3, § 491.) When the husband abandons the wife she may convey as a *feme sole*. *Chester v. Breitling*, 88 Tex. 586 (32 S. W. Rep. 527).

Sec. 490. Virginia. (See Vol. 2, § 424; Vol. 3, § 492.) Code, § 2295 (2 Ballards' Annual, § 424), is amended so as to read as follows: "Every contract hereafter made by a married woman, which she has the power to make, shall be deemed to be made with reference to her estate, which is made her separate estate by this chapter, as a source of credit; and every such contract shall be deemed as intended to be made with reference to her equitable separate estate also, if any she has, as a source of credit, to the extent of her power over the same, unless the contrary intention is expressed in the contract; and in the enforcement of every such contract against her equitable separate estate a court of equity may in any case subject, to the extent of her power over the same and of her interest therein, the *corpus* of any real estate as well as the *corpus* of any personal estate settled to her separate use, but the *corpus* of such real estate shall not be subjected by a sale of the same, or any part thereof, unless it is admitted or made to appear that the rents and profits of such real estate will not be sufficient to discharge the liabilities of such estate within five years; Provided, that if the contract be a covenant of warranty in such writing as is mentioned in section 2502, it shall be subject to the provisions of said section." Acts 1895-96, p. 486. The equitable separate estate of a married woman is the creature of a court of equity, and an injunction will always be granted, where necessary, to protect, aid, or enforce any equitable estate or interest which she may have, although the statute may furnish her a complete and adequate remedy at law. Va. Code, 1887, § 2999, applied. *Filler v. Tyler*, 91 Va. 458 (22 S. E. Rep. 235). She may convey the same as a *feme sole* unless her power

of alienation is restrained by the instrument creating the separate estate, but prior to July 1, 1850, she had no power to dispose of her separate real estate unless such power was given in the instrument creating it. *Dillard v. Dillard's Ex'rs*, Va. (21 S. E. Rep. 669). Her contracts can only be enforced against the statutory or equitable separate estate held by her at the time of the making of the contract, or that part of which she owns at the time of the decree, and not against property acquired subsequent to the making of the contract. *Filler v. Tyler*, 91 Va. 458 (22 S. E. Rep. 235).

Sec. 491. West Virginia. (See Vol. 2, § 426; Vol. 3, § 493.) Her separate estate may be subjected to the payment of a joint and several note executed by her and her husband. *Skidmore v. Jett*, 39 W. Va. 544 (20 S. E. Rep. 573). Under Act 1893, ch. 3, a court of law has jurisdiction to entertain an action and render personal judgment against a married woman upon a contract made during coverture, binding her separate estate; and any contract of a married woman, made since this statute, which binds her separate estate, may be enforced against her separate estate, whether owned by her at the time of the contract or afterwards acquired, the same as if she were a *feme sole*. *Williamson v. Cline*, 40 W. Va. 194 (20 S. E. Rep. 917). She may bind her separate estate by a contract as surety for her husband. *Williamson v. Cline*, 40 W. Va. 194 (20 S. E. Rep. 917). Her real estate is subject to execution for a fine imposed upon her for misdemeanor. *Gill v. State*, 39 W. Va. 479 (20 S. E. Rep. 568; 45 Am. St. Rep. 928).

Sec. 492. Wisconsin. (See Vol. 2, § 427.) Rev. Stat. § 2342 is amended so as to read as follows; "Any married female may receive by inheritance, or by gift, grant, devise or bequest from any person, and hold to her sole and separate use, and convey and devise real and personal property and any interest and estate therein of any description, including all held in joint tenancy with her husband, and the rents, issues, and profits, in the same manner, and with like effect, as if she were unmarried; and any conveyance, transfer or lien, executed by either husband or wife to or in favor of the other, shall be valid to the same extent as between other persons." Laws 1895, ch. 86.

MECHANICS' LIENS.

EPITOME OF CASES.

Sec. 493. Estate to which lien may attach and extent of property covered by it. A statute (Cal. Code Civ. Proc., § 1185) which subjects to a lien on a building the

land upon which it is constructed "with a convenient space about the same or so much as may be required for the convenient use and occupation thereof," does not extend the lien to the whole tract or to sufficient land around the building to support the owner. *Cowan v. Griffith*, 108 Cal. 224 (41 Pac. Rep. 42; 49 Am. St. Rep. 82). In construing New Mexico Comp. Laws 1884, § 1524, which is very similar to the California statute, it is held that the term "so much as may be required for the convenient use and occupation thereof" means all the land benefited and the value of which is increased or enhanced by the improvements actually made upon the land apurtenant and adjacent thereto, and a lien for the construction of a ditch will be enforced accordingly. *Ford v. Springer Land Ass'n*, N. M. (41 Pac. Rep. 541). The court say: "A ditch requires much more land for a convenient space, use, and occupation than a house, wall, or fence, and a lien will attach for the construction of either; and no one would contend that the space would be limited to the land actually occupied by either. A lien may attach for the planting of a fruit orchard, and it could not be contended that only the space actually occupied by each tree would be subjected to the effects of the lien, but it would attach to the whole tract upon which the orchard was planted. To hold that this lien attaches only to the ditch system, 26 miles long and 60 feet wide, would be, in effect, to render the security for the payment of appellee's demands practically valueless, and to defeat the very spirit and intent of the law on which he had the right to rely for protection to secure payment for his labor. When the legislature enacted the mechanic's lien law it meant to provide security, and to say to the laborer, either skilled or unskilled, and to the material man, when he improves land with his skill, labor, or material, that all the property so improved in value shall be held by him as security until his demands are paid in the manner provided by the statutes. The following authorities are cited in support of this proposition: *Walker v. Stock Co.*, 9 S. C. 204; *Roby v. University*, 86 Vt. 564; *Vandyne v. Vanness*, 5 N. J. Eq. 485; *Nelson v. Campbell*, 28 Pa. St. 156." A branch or section of a main canal may be subjected to a lien for material and labor used in its construction. *Creer v. Cache Val Canal Co.*,

Idaho. (38 Pac. Rep. 653). Wires and insulators, which are used in forming and completing the connection between an electric light and power plant and the dwellings, stores and other public places for the purpose of conveying or transmitting light and heat thereto, are fixtures within the provisions of the New Jersey mechanic's lien law. *Hughes v. Lambertville Elec. L. H. & P. Co.*, 58 N. J. Eq. 435 (32 Atl. Rep. 69). A lien may be enforced against community property for buildings erected under a contract with the husband. *Douthitt v. MacCulsky*, 11 Wash. St. 601 (40 Pac. Rep. 186).

Sec. 494. Kind of labor or material for which a lien may be claimed. Under Mills' Colo. Stat., § 2867, a lien can be enforced only for labor or material furnished under a contract with the owner of land, his agent or trustee, and it is restricted to the work done "upon such land." *Johnson v. Bennett*, 6 Colo. App. 362 (40 Pac. Rep. 847). Under Minn. Gen. Stat. 1894, § 6229, which gives a lien to "whoever performs labor or furnishes skill, material or machinery" for the erection of a building, it is held that a lien may be claimed for labor performed by one for a building contractor in polishing granite columns to be used in a building, although he did not know at the time he performed the work, for what particular building the columns were intended, it being apparent that they were for use directly in the construction of some permanent structure and not for the general market. *Emery v. Hertig*, 60 Minn. 54 (61 N. W. Rep. 830). Under N. M. Comp. Laws 1884, § 1520, a lien may be enforced for labor and materials furnished for the construction of a ditch. *Ford v. Springer Land Ass'n*, N. M. (41 Pac. Rep. 541). In construing Pa. Act, June 16, 1886, which provides for a lien for the erection and construction of a building, it is held that a boiler battery having a stone foundation resting in the earth and brick walls to the top of the boilers, although connected with another building and having no distinct covering of its own is a new "building." *Wheeler v. Pierce*, 167 Pa. 416 (31 Atl. Rep. 649; 46 Am. St. Rep. 679). A statute (N. C. Code, § 1781) which provides that "every building built * * * shall be subject to a lien, for the payment of all debts contracted for work done on the same, or material furnished," is held not to

give a lien to one employed as a superintendent. *Cook v. Ross*, 117 N. C. 193 (23 S. E. Rep. 252); and under a statute (Me. Rev. Stat., ch. 51, § 141) making railroad companies liable to "laborers" employed by their contractors "for labor actually performed on the road" it is held that one who superintends the building of bridges at an agreed compensation of seven dollars per day, keeps an account of the men's time and makes out their pay rolls, is not a "laborer" within the meaning of this statute. *Blanchard v. Portland & R. F. Ry.*, 87 Me. 241 (32 Atl. Rep. 890). The court say: "A laborer, says Webster, is one who labors in a toilsome occupation; a person that does work that requires strength rather than skill, as distinguished from that of an artisan. And in the construction of statutes similar to our own, it has been held that the word 'laborer' does not include a bookkeeper or a superintendent, *Wakefield v. Fargo*, 90 N. Y. 218; nor a civil engineer, *Railroad Co. v. Leuffer*, 84 Pa. St. 168; nor an assistant engineer, *Brockway v. Innes*, 89 Mich. 47 (38 Am. Rep. 348); nor an overseer, *Whitaker v. Smith*, 81 N. C. 340; (31 Am. Rep. 503); nor one who has contracted to do a certain amount of grubbing, notwithstanding he labors with the men employed by him to do the work, *Rogers v. Railroad Co.*, 85 Me. 372 (27 Atl. Rep. 257). In the language of the business world, says Mr. Chief Justice Peters, a laborer is one who labors with his physical powers, in the service and under the direction of another, for fixed wages; that this is the common meaning of the word, and hence its meaning in the statute; that while etymologically the word 'laborer' may include any person who performs physical or mental labor under any circumstances, its popular meaning is much more limited. Similar expressions are used in several of the cases cited. In *Leuffer's Case* it is said that, when we speak of laboring men, we certainly do not intend to include bookkeepers or engineers, the value of whose services rests rather in their scientific than their physical ability; that we intend those who are engaged, not in head, but in hand, work; that, while in one sense an engineer is a laborer, so is a lawyer, or a doctor, or a banker, or a corporation officer, and yet no statistician ever classed them as such. Again it has been said that such and similar statutes are presumptively intended

to protect a class of men who are ill-fitted to protect themselves—men who are dependent upon the fruits of their daily toil for the daily subsistence of themselves and their families—and that they should not be extended, by a forced construction so as to include a class of men who are competent to take care of themselves, and need no such protection.”

Sec. 495. Vendor and vendee. Where under the terms of an executory contract of sale a vendee is required to make certain improvements, both his interest and the interest of the vendor are subject to liens arising on account of the construction of such improvements. *Shapleigh v. Hull*, 21 Colo. 419 (41 Pac. Rep. 1108). Citing, *Henderson v. Connelly*, 123 Ill. 98 (14 N. E. Rep. 1; 5 Am. St. Rep. 490); *Davis v. Humphrey*, 112 Mass. 809; *Manufacturing Co. v. Kountze*, 80 Neb. 719 (46 N. W. Rep. 1128); *Hill v. Gill*, 40 Minn. 441 (42 N. W. Rep. 294); *Hickey v. Collom*, 47 Minn. 565 (50 N. W. Rep. 918); Phil. Mech. Liens (8d Ed.), § 69. Where a building is completed by one holding under an agreement from the owner to convey to him when he shall complete the building, the owner advancing money to pay therefor, which has to be repaid before the execution of the conveyance, the consent of the owner to such completion will be implied. Mass. Pub. Stat., Ch. 191, § 1, applied. *Border v. Mercer*, 163 Mass. 7 (39 N. E. Rep. 418). Where, in an action to foreclose mechanics' liens, it conclusively appears from the record that credit was given to the party in possession of the property under an option to purchase, and not to the owner of the property, such liens will not, on the failure of the party in possession, and to whom credit was given, to fulfill his contract, and avail himself of the option, be enforceable against the owner or his property. *Steel v. Argentine Min. Co.*, Ida. (42 Pac. Rep. 585).

Sec. 496. Improvements by lessee. A lien cannot be enforced against property for repairs made by a lessee thereof in pursuance to the terms of his lease with the owner. *Schrage v. Miller*, 44 Neb. 818 (62 N. W. Rep. 1091); but where by the terms of a lease the lessee erects buildings which the lessor agrees to pay for, a lien may be enforced against the land therefor. *Kremer v. Walton*, 11 Wash. St. 120 (39 Pac.

Rep. 874; 48 Am. St. Rep. 870). Where a lessee makes improvements as such a lien can only be enforced therefor against his leasehold interest, and the fee does not become subject to the lien by the owner thereof purchasing such improvements from the lessee after the forfeiture of his lease. *Masow v. Fife*, 10 Wash. St. 528 (89 Pac. Rep. 140). Under the statutes of Maine (Rev. Stat., ch. 91, § 80) a lien may be enforced against the fee for improvements made by a tenant where it appears that the landlord consented thereto. *Shaw v. Young*, 87 Me. 271 (32 Atl. Rep. 897). Ore. Act Feb. 20, 1891, § 1, exempting the interest of the owner of a mine from a lien for improvements made by his lessee, construed and applied to particular facts. *Stinson v. Hardy*, 27 Ore. 584 (41 Pac. Rep. 116).

Sec. 497. Public buildings. The lien law of Kansas is held sufficiently comprehensive to authorize a lien in favor of a material man who furnishes materials for the erection of a public building for a city of the first class. *City of Topeka v. Thomas*, 1 Kan. App. 118 (40 Pac. Rep. 980). A statute (Colo. Gen. Stat. 1883, pp. 662-669) giving liens to contractors and subcontractors on the property of the owner, does not authorize the enforcement of a lien against a school district on account of the construction of a school house. *Florman v. School Dist. No. 11*, 6 Colo. App. 819 (40 Pac. Rep. 469). Substantially the same is held in *Nunnally v. Dorand*, Ala. (18 So. Rep. 5). Although a mechanic's lien cannot be enforced against a public building, yet where the contract for the erection of such a building provides that the money due the contractor shall be retained in the hands of the public authorities for the purpose of satisfying the claims of lienholders, it is held that such fund will be substituted for the building, and be subject to liens. *Roe v. Scanlan*, Ky. (32 S. W. Rep. 216).

Sec. 498. Joint lien on several lots or buildings. Where separate houses on adjoining lots are erected under one contract each lot is subject to a lien for the improvement of all. *Miexell v. Griest*, 1 Kan. App. 145 (40 Pac. Rep. 1070). Citing, *Doolittle v. Plenz*, 16 Neb. 153 (20 N. W. Rep. 116); *Manufacturing Co. v. Shea*, 24 Ore. 40 (32 Pac. Rep. 759);

Phillips v. Gilbert, 101 U. S. 721; *Pennock v. Hoover*, 5 Rawle, 291; *Miller v. Shepard*, 50 Minn. 286 (52 N. W. Rep. 894); *Fullerton v. Leonard*, 13 S. Dak. 118 (52 N. W. Rep. 825); *Sergeant v. Denby*, 87 Va. 206 (12 S. E. Rep. 402); *Williams v. Judd-Wells Co.*, Iowa, (59 N. W. Rep. 271). Where material is furnished to the owner of several lots to build separate houses thereon the debt may be charged to all the real estate, but all the debt cannot be charged to a part thereof; and where it is sought to charge a part only of such lots for material furnished the amount must be apportioned according to the value of the material actually used on said part. *Badger Lumber Co. v. Holmes*, 44 Neb. 244 (62 N. W. Rep. 446; 48 Am. St. Rep. 726). Where there are several buildings owned by different persons a lien for materials can only be enforced by showing what material went into each of the buildings. *Bartlett v. Bilger*, Ia.

(61 N. W. Rep. 283). Where several houses upon contiguous lots are each constructed under a distinct and separate contract, liens for labor and materials furnished must be enforced separately as to each house. *North & South Lum. Co. v. Hegwer*, 1 Kan. App. 623 (42 Pac. Rep. 388).

Sec. 499. Priority of mechanics' liens. They are subject to existing liens. *Thorpe Block Sav. & L. Ass'n. v. James*, 13 Ind. App. 522 (41 N. E. Rep. 978). Under N. H. Pub. Stat. ch. 141, §§ 16, 17, it is held that mechanics' liens have precedence in the order of their accrual, and, if they accrue simultaneously, in the order of the attachments made to secure them. *Kendall v. Pickard*, N. H. (32 Atl. Rep. 768). A lien claimed for materials, duly filed, takes effect and has priority from the day of the furnishing of the first materials. *Pacific Mut. L. Ins. Co. v. Fisher*, 106 Cal. 224 (39 Pac. Rep. 758). When an administratrix purchases lands with funds belonging to the estate, taking title thereto in her own name, a lien for the construction of a building thereon has priority over the rights of the heirs of the decedent. *Seibel v. Bath*, Wyo. (40 Pac. Rep. 756). Under Ill. Rev. Stat. 1893, ch. 82, § 28, providing that the lien cannot be enforced "to the prejudice of any other creditor or incumbrancer or purchaser" unless a claim therefor has been filed

as required by statute "within four months after the last payment shall have become due and payable," it is held that one who buys after the claim for a lien is filed, and who has full notice of it, takes title free of the lien if the claim therefor is filed after said four months. *Von Tobel v. Ostrander*, 158 Ill. 499 (42 N. E. Rep. 152). A lien for materials is inferior to a mortgage on the property recorded before any materials were furnished. *Bartlett v. Bilger*, Ia. (61 N. W. Rep. 233). The holder of a mechanic's lien may waive its priority in favor of a mortgagee and when the latter has acted in reliance upon such waiver the former will be estopped to deny it. *Acker v. Massman*, 12 Ind. App. 696 (41 N. E. Rep. 77). Where a recorded mortgage specifies that it is junior to a mortgage to be executed to another for a specified amount, and mechanics' liens attach to the property before the last mortgage is recorded, such liens and the latter mortgage do not thereby acquire priority over the first mortgage to their full amount, but its priority is postponed only to the amount specified in it. *Thorpe Block Sav. & L. Ass'n. v. James*, 13 Ind. App. 522 (41 N. E. Rep. 978). Where a vendee's lien for purchase money is released in favor of a mortgage for money to erect buildings, in a sale of the property to enforce a mechanic's lien on account of such buildings, the proceeds will be applied as follows: First, to the mortgagee to the extent of the unpaid purchase price secured by the vendor's lien; Second, payment in full of the mechanic's lien; Third, the balance due on the mortgage; Fourth, the vendor's claim. *Leming v. Stephens*, 95 Tenn. 444 (32 S. W. Rep. 961). Where in an action between lien claimants to establish their priorities one of them fails to avail himself of an agreement between him and a mortgagee giving his lien priority over such mortgage, it is held that in a subsequent action by the builder to establish his lien, parties to the prior action and the mortgagee being made parties, such lienor may assert and enforce the agreement giving him priority over the mortgage. *Potvin v. Denny Hotel Co.*, 9 Wash. St. 316 (38 Pac. Rep. 1002). Reversing *Potvin v. Denny Hotel Co.*, 9 Wash. St. 316 (37 Pac. Rep. 320). The lien of a mortgage on real estate, taken while a building is in process of erection thereon, is subject to

the claims of material men and laborers for material already and thereafter furnished, and for labor already and thereafter performed in the erection of such building, when the commencement of such furnishing of material or the commencement of the performance of such labor was prior to the record of said mortgage. *Chapman v. Brewer*, 48 Neb. 890 (62 N. W. Rep. 820). Under S. Dak. Comp. Laws, § 5480, a mechanic's lien for labor or materials used in the construction of a building has priority over a previous mortgage on the premises, as to such building, and the lien claimant may remove the building upon foreclosure of the mortgage. *Laird-Norton Co. v. Herker*, S. Dak. (62 N. W. Rep. 104). One seeking to establish the priority of his lien for materials over a mortgage is not prevented from showing the actual date upon which the materials were furnished by the giving of a different and later date in his lien statement. *Chapman v. Brewer*, 48 Neb. 890 (62 N. W. Rep. 820). A lien for machinery required and contemplated by the original plan, and placed in the structure in due course of its erection, dates from the commencement of the building, and is superior to a mortgage executed after such date, but before the machinery was actually furnished. *Flint & Walling Mfg. Co. v. Douglas Sugar Co.*, 54 Kan. 455 (88 Pac. Rep. 566); *Keystone Iron Works Co. v. Douglas Sugar Co.*, 55 Kan. 195 (40 Pac. Rep. 278). A mortgage filed for record August 21, 1890, has priority over a lien claim for materials alleged to have been delivered "between August 21, 1890, and January 22, 1891," it being held that the word "between" excluded the first date. *Weir v. Thomas*, 44 Neb. 507 (62 N. W. Rep. 871; 48 Am. St. Rep. 741). Ala. Code, § 8019, applied—priority of mechanic's lien over mortgage. *Leftwich Lum. Co. v. Florence Mut. B. L. & S. Ass'n*, 104 Ala. 584 (18 So. Rep. 48).

Sec. 500. Filing of lien after death of property owner — Priority as against his devisees. In construing N. Y. Laws, 1885, ch. 842, § 5, which provides that mechanics' liens "shall be preferred as prior liens to any conveyance, judgment or other claim which was not docketed or recorded at the time of filing the notice of lien prescribed in the fourth

section of this act," it is held that a lien filed after the death of the owner for work done before his death does not attach to the interest of the owner's devisees. *Tubridy v. Wright*, 144 N. Y. 519 (89 N. E. Rep. 640; 48 Am. St. Rep. 776). The court say: "The question presented upon this review is as to whether the plaintiff acquired a valid lien upon the property for the work done under the contract prior to the death of the defendant's testator. It has been held that, upon the death of the owner of real property, the title passes to his heirs at law or devisees, and that the right to file a mechanic's lien for materials furnished and labor performed terminates with his death. *Crystal v. Flannelly*, 2 E. D. Smith, 588; *Meyers v. Bennett*, 7 Daly, 471; *Brown v. Zeiss*, 9 Daly, 240; *Leavy v. Gardner*, 68 N. Y. 624." * * * "No provision is found in the statute giving the claimant the right to acquire a lien after the death of the owner. Mechanics' liens are created by the statute, and while the law should receive a liberal construction, so as to secure the beneficial purpose had in view by the legislature, yet, as it creates a remedy unknown to the common law, it may not be extended to cases not fairly within its general scope and purview. *Spruck v. McRoberts*, 139 N. Y. 193 (34 N. E. Rep. 896); *Stevens v. Ogden*, 180 N. Y. 182 (29 N. E. Rep. 229); *McCorkle v. Herrman*, 117 N. Y. 297 (22 N. E. Rep. 948). It may be claimed that the equities in favor of the lienor are as strong after the decease of the owner as in his lifetime, but the difficulty is that upon his death the rights of the general creditors intervene, who are entitled to have the entire estate, if necessary, devoted to the payment of their claims."

Sec. 501. Subcontractors and material men. Statutes creating liens in favor of subcontractors or employees are to be strictly construed. *Blanchard v. Portland & R. F. Ry.*, 87 Me. 241 (32 Atl. Rep. 890). In the absence of a statute excluding them, subcontractors in the third degree can enforce a lien. *Sayre-Newton L. Co. v. Union Bank*, 6 Colo. App. 541 (41 Pac. Rep. 844). Under Mont. Comp. Stat., div. 5, § 1391, providing that "all persons furnishing things or doing work shall be considered subcontractors," it is held that a subcontractor in the third degree is entitled to a

lien. *Duignan v. Montana Club*, 16 Mont. 189 (40 Pac. Rep. 294). See opinion for extensive discussion of this subject. This opinion is approved and followed in the case of *Eccleston v. Hetting*, 16 Mont. 88 (42 Pac. Rep. 105). A subcontractor employed to grub and clear the right of way for a railroad and to grade and construct the roadbed may have a lien therefor. *Dean v. Reynolds*, 12 Ind. App. 97 (39 N. E. Rep. 768). A subcontractor has no rights in a fund deposited in escrow in a bank by the owner to be paid over to the contractor after deducting therefrom an amount equal to liens existing in favor of subcontractors. *Sayre-Newton L. Co. v. Union Bank*, 6 Colo. App. 541 (41 Pac. Rep. 844). One who occupies the relation of subcontractor does not become a principal contractor by reason of the landowner's promising to pay his claim and executing a note therefor. *Missouri R. L. Co. v. Finance Co.*, Ia. (61 N. W. Rep. 918). A subcontractor cannot be deprived of his lien by a covenant of the contractor that no liens should be filed which covenant is shown to be the outgrowth of a fraudulent scheme between the contractor and builder to defeat the just claims of other parties. *Ballman v. Heron*, 169 Pa. 510 (82 Atl. Rep. 594). No prescribed form is required for a notice by a material man of his intention to claim a lien; it is sufficient if it apprises the owner and others interested that the furnisher of the materials claims to have a lien on the property. *Clark v. Huey*, 12 Ind. App. 224 (40 N. E. Rep. 152).

A finding that a material man furnished materials to a contractor for different buildings, charging all to his general account, does not raise the presumption that they were furnished solely on his credit. *Clark v. Huey*, 12 Ind. App. 224 (40 N. E. Rep. 152). One furnishing a contractor materials must show that they were furnished for the particular building on which the lien is sought to be enforced. *Farrell v. La Fayette L. & Mfg. Co.*, 12 Ind. App. 826 (40 N. E. Rep. 25). A material man's right of recovery is limited to the value of the materials furnished by him which are actually used in the building. *Scranton Lathe Turning Co. v. Cassidy*, 167 Pa. 469 (81 Atl. Rep. 734). Where material is sold and delivered in the justifiable belief and expectation that it is to be used in buildings on the premises where all material previously

sold had gone, and the person furnishing the same has no knowledge that it is to be used for another purpose, his lien cannot be defeated by the use of the material on other and different premises. *John Paul Lumber Co. v. Hormel*, 61 Ia. 303 (63 N. W. Rep. 718). A material man does not lose his lien simply because he furnished the materials for a building upon the order and credit of a contractor, and not upon the credit of the building in which they are to be used. *Clark v. Huey*, 12 Ind. App. 224 (40 N. E. Rep. 152). Collating and citing numerous authorities. When all the items in the account relate to one transaction, between the same parties, it constitutes a continuous account, regardless of different times of delivery, and dates from the day of the last item. *Helena Steam-Heating & Supply Co. v. Wells*, 16 Mont. 65 (40 Pac. Rep. 78).

Sec. 502. Subcontractors and material men—Statutes construed. Cal. Code Civ. Proc., § 1193, applied—duty of contractor to protect property against liens of subcontractors. *Clancy v. Plover*, 107 Cal. 272 (40 Pac. Rep. 394). Under Cal. Code Civ. Proc., § 1184, which requires the owner to retain a certain percentage of the contract price for thirty-five days after the completion of the work, and provides that subcontractors and material men may serve notice of their claims upon said owner, it is held that notice may be served after the expiration of the thirty-five days, provided the owner still has in his hands funds belonging to the contractor. *Board of Education v. Blake*, Cal. (38 Pac. Rep. 536). A material man cannot enforce his rights under this section against the assignee of the contractor who has taken an assignment of the balance due such contractor after the time for payment has arrived and without any knowledge of the unpaid demand. *First Nat. Bank v. Perris Irr. Dist.*, 107 Cal. 55 (40 Pac. Rep. 45). Under Colo. Sess. Laws 1889, p. 247, a lien in favor of subcontractors cannot be enforced to an amount greater than the indebtedness of the owner to the contractor. *Sayre-Newton L. Co. v. Union Bank*, 6 Colo. App. 541 (41 Pac. Rep. 844). Under the statutes of Idaho, any person contracting directly and exclusively with the owner, and between whom and the contractor for the construction of

the structure there is neither relation of interest nor privity of contract, is an original contractor, and is entitled to the rights of such. *Colorado Iron Works v. Riekenburg*, Idaho (88 Pac. Rep. 651). Under Ia. Acts 16th Gen. Assem., ch. 100, § 8, a subcontractor who files his lien after the expiration of the statutory thirty days is limited in his recovery from the owner "to the extent of the balance due from the owner to the contractor at the time" the owner is served with notice. *Thompson v. Spencer*, Ia. (68 N. W. Rep. 695). A laborer's lien, given by Mass. Pub. Stat., ch. 191, § 1, although he is employed by a contractor, is not by way of subrogation, and does not depend upon the terms of the contract, or the state of the account between his employer and the owner of the land. *Bowen v. Phinney*, 162 Mass. 598 (89 N. E. Rep. 288).

Sec. 503. Loss or waiver of lien. Accepting the note of the owner, payable within the time allowed for filing a lien, will not operate as a waiver. *Leftwich Lum. Co. v. Florence Mut. B. L. & S. Ass'n*, 104 Ala. 584 (18 So. Rep. 48). The taking of collateral security does not operate as a waiver of the lien unless such was the intention of the parties. *Baker v. Abrams*, 42 Neb. 880 (61 N. W. Rep. 91). Where the right of a lien exists in favor of a partnership the sale of the interest of one partner to the others does not affect such right. *Simons v. Webster*, 108 Cal. 16 (40 Pac. Rep. 1056). A statement in a written contract given to one furnishing material and machinery for a building that he "shall have a lien upon all the machinery, fixtures, etc., herein mentioned, and upon the building and real estate where said machinery is placed, to secure all claims of said company," does not in any way affect his right to the statutory mechanic's lien. *Chapman v. Brewer*, 43 Neb. 890 (62 N. W. Rep. 320). The acceptance of a mortgage by a mechanic's lien holder, covering the property to which the mechanic's lien has attached, will not be deemed a waiver of the former lien where such was not the intention of the parties, and such additional security does not infringe upon the rights of other parties. *Chapman v. Brewer*, 43 Neb. 890 (62 N. W. Rep. 320). A material man does not lose his lien by accepting an assignment from the

builders of all their rights under their contract with the owner. *Taliaferro v. Stevenson*, N. J. L. (88 Atl. Rep. 888). A surety on a contractor's bond to secure the owner against the enforcement of liens cannot enforce against such owner a lien growing out of his principal's contract. *Spears v. Lawrence*, 10 Wash. St. 868 (88 Pac. Rep. 1049; 45 Am. St. Rep. 789); but a material man is not estopped to assert his lien on account of the fact that he is on the contractor's bond to save the owner from loss on account of the default or negligence of the contractor. *Blythe v. Torre*, Cal. (88 Pac. Rep. 689).

Sec. 504. Filing and recording building contracts—Statutes construed. In construing Cal. Code Civ. Proc., § 1188, which provides that where the amount to be paid for an improvement shall exceed \$1,000 the contract shall be in writing, which contract, or memorandum thereof, containing the names of the parties, description of the property, statement of the general character of the work to be done, the total amount to be paid and the terms for making payment, shall be recorded in the recorder's office, a statement in the contract of the general character of the work to be done thereunder as follows: "Third. The general character of the work to be done under said contract is as follows, to-wit: The said W. R. Dunning, as contractor, agrees with the said M. B. Levy, as owner, to furnish the necessary labor and materials including tools, implements, and appliances, required in the erection of a two-story building 51.0 by 25.0, and in a workmanlike manner, in conformity with the plans, drawings and specifications for the same made by John Gash, the authorized architect employed by the owner, and which are signed by the parties hereto, and are to be kept and remain in the office of said architect, subject to the inspection of the parties hereto, and others concerned in said erection," was held insufficient. *Butterworth v. Levy*, 104 Cal. 506 (88 Pac. Rep. 897). The following memorandum, the plans, drawings, and specifications referred to being neither set out nor filed, "a one-story brick building, and all work mentioned in the specifications in connection therewith, in a workmanlike manner, and in conformity with the plans, drawings, and specifications for the same

made by the construction committee of said company," was held insufficient. *Wood v. Oakland & B. Rapid T. Co.*, 107 Cal. 500 (40 Pac. Rep. 806). A memoranda which contains as its only description of the property and of the work to be done that "the building is to be a frame building," is fatally defective. *Blyth v. Torre*, Cal. (38 Pac. Rep. 639). Under N. J. Act, March 29, 1892, Pamph. Laws 1892, p. 358, which provides that where a contract for making improvements is in writing the recording of such contract shall relieve the building from liability to any one except the contractor, it is held that the plans and specifications need not be recorded with the contract unless their presence is necessary in order to ascertain how much of the building the contract covers; it is also held that in order to have the benefit of the statute the owner must file his contract at or before the time when the improvement is begun. *La Foucherie v. Knutzen*, N. J. L. (33 Atl. Rep. 203). To the same effect is the case of *Freedman v. Sandknop*, 53 N. J. Eq. 243 (31 Atl. Rep. 232). For further application of this statute, see *Magown v. Stevenson*, N. J. L. (32 Atl. Rep. 1057). Where the right to a lien is given by the constitution (Tex. Const., Art. 16, § 37), it is held that a contractor cannot be deprived of his lien on account of his failure to comply with the statute (Tex. Rev. Stat. Art. 3165) requiring him to file his contract for record within a given time, such failure being occasioned by the owner having the contract in his possession and refusing to surrender it for registry. *Warner El. Mfg. Co. v. Maverick*, 88 Tex. 489 (30 S. W. Rep. 437); for extensive construction of Art. 3165, see opinion on rehearing of this case. *Warner El. Mfg. Co. v. Maverick*, 88 Tex. 489 (31 S. W. Rep. 353).

Sec. 505. Filing of lien statement. The claim need not be personally filed by the claimant. *Corbett v. Chambers*, 109 Cal. 178 (41 Pac. Rep. 873). No particular form is required. *Ford v. Springer Land Ass'n*, N. M. (41 Pac. Rep. 541). In determining the sufficiency of a lien statement the whole should be taken together. *United States Blowpipe Co. v. Spencer*, 40 W. Va. 698 (21 S. E. Rep. 769). The notice of a claim to a lien, being the foundation of the action, must contain all the essential requirements of the

statute. *Ford v. Springer Land Ass'n*, N. M. (41 Pac. Rep. 541); *Sayre-Newton L. Co. v. Union Bank*, 6 Colo. App. 541 (41 Pac. Rep. 844); but it is not necessarily defective because it contains more than the statute requires. *John Paul Lumber Co. v. Hormel*, 61 Minn. 808 (68 N. W. Rep. 718). A lien statement not having the plans and specifications attached to it is sufficient where they are referred to and their substance is stated. *Mras v. Duff*, 11 Wash. St. 36 (39 Pac. Rep. 267). An allegation in a lien statement by a material man to the effect that two persons to whom he furnished materials were contractors does not vitiate his claim where it appears that only one of them was a contractor and the other a subcontractor, both having represented themselves to the lien claimant as contractors. *McHugh v. Slack*, 11 Wash. St. 370 (39 Pac. Rep. 674). Under a statute (Mich. Pub. Acts 1891, No. 179) requiring personal service of a copy of the lien statement upon the owner, it is held that an owner who accepts service of a copy of the statement in lieu of the statutory service, before the time had elapsed within which the statutory service could have been made, is estopped to assert that the service was not made in a statutory manner. *Mouat v. Fisher*, 104 Mich. 262 (62 N. W. Rep. 838). Mich. Pub. Acts 1893, No. 199, § 6, construed and applied—service of notice of the filing of the lien. *Hannah & Lay Mercantile Co. v. Mosser*, Mich. (62 N. W. Rep. 1120). In Pennsylvania it is held that a lien statement which was fatally defective on account of failure to specify the items of the claim, could not be amended so as to cure the defect after the expiration of the time for filing the lien. *McFarland v. Schultz*, 168 Pa. 684 (32 Atl. Rep. 94).

Sec. 506. Lien statement—Time for filing. The right to a lien is lost unless asserted within the time given by statute. Fla. Laws 1887, Ch. 3747, applied. *Eddins v. Tweddle*, 35 Fla. 107 (17 So. Rep. 66). The same is held in Indiana. *Alexandria Bldg Co. v. McHugh*, 12 Ind. App. 282 (40 N. E. Rep. 80). In construing Cal. Code Civ. Proc., §1187, requiring certain lien claims to be filed within thirty days after the completion of the building, it is held that the filing of such a lien statement prior to the completion of the

building, is premature, and the lien cannot be enforced. *Davis v. McDonough*, 109 Cal. 547 (42 Pac. Rep. 450). Under this statute an "original contractor" may file his claim for lien "within sixty days after the completion of his contract," irrespective of the time when the building is completed. *Pacific Mut. L. Ins. Co. v. Fisher*, 106 Cal. 224 (39 Pac. Rep. 758). Particular facts held to constitute the completion of a building for the purpose of determining the time within which liens should be filed. *Rice v. Brown*, 1 Kan. App. 646 (42 Pac. Rep. 896). Under Neb. Comp. Stat. 1895, § 3667, a lien statement must be filed within sixty days after the last day upon which labor or materials were furnished. *Hansen v. Kinney*, 46 Neb. 207 (64 N. W. Rep. 710). A lien statement filed Nov. 8, in which the last charge is for work for the month of October, was held to be filed within thirty days from the termination of the work, within the meaning of Va. Code 1887, §§ 2475, 2476. *Richlands Flint-Glass Co. v. Hildebeitel*, 92 Va. 91 (22 S. E. Rep. 806). Where materials are furnished under separate and distinct contracts such contracts cannot be tacked and a lien for all the materials enforced under one statement filed within the statutory limit from the date of the furnishing of the last item under the last contract. *Central Loan & T. Co. v. O'Sullivan*, 44 Neb. 834 (68 N. W. Rep. 5); *Hanson v. Kinney*, 46 Neb. 207 (64 N. W. Rep. 710). Where a lien is claimed for material shipped to a contractor by freight the time for filing the lien statement begins to run from the date of the arrival of the material at its destination. *Buchanan v. Selden*, 48 Neb. 559 (61 N. W. Rep. 732). Under Kan. Laws 1872, Ch. 141, a subcontractor furnishing materials has sixty days after the completion of the building in which to file his lien statement. *Weyerhaeuser v. Fraim*, 54 Kan. 645 (39 Pac. Rep. 188). Under Neb. Comp. Stat., Ch. 54, Art 1, § 2, a subcontractor acquires no lien unless he files his lien statement within sixty days from the date whereon the last item of material was furnished by him. *Wells v. David City Imp. Ass'n*, 48 Neb. 366 (61 N. W. Rep. 623). For application of this statute to particular facts, see *Buchanan v. Selden*, 48 Neb. 559 (61 N. W. Rep. 732).

Sec. 507. Lien statement—Allegation as to ownership of the property. Cal. Code Civ. Proc., § 1187, requiring the statement to give "the name of the owner or reputed owner, if known," is held to mean the owner or reputed owner at the time of the filing of the claim. *Corbett v. Chambers*, 109 Cal. 178 (41 Pac. Rep. 873). In construing a similar statute (N. M. Comp. Laws, 1884, § 1524), it is held that a notice which states that certain corporations and individuals are "the owners or reputed owners" of the property is sufficient. *Ford v. Springer Land Ass'n*, N. M. (41 Pac. Rep. 541). Where the statute requires the lien statement to give the name of the owner of the premises, a statement giving the names of two of the owners where the property is held jointly by three persons is insufficient, and it is held that in such case the lien cannot be enforced against the undivided interests of the persons named. *F. A. Drew Glass Co. v. Eagle Mill Co.*, 1 Kan. App. 614 (42 Pac. Rep. 387). Ida. Rev. Stat., § 5180, applied—sufficiency of allegation of ownership. *Steel v. Argentine Min. Co.*, Ida. (42 Pac. Rep. 585). A statute (Hill's Ore. Code, § 3673) requiring the lien statement to give the name of the owner is complied with by giving the name of the owner at the time of the filing of the statement. *Williamette S. M. L. & Mfg. Co. v. McLeod*, 27 Ore. 272 (40 Pac. Rep. 93). Under a statute (Hill's Wash. Code, Vol. 1, § 1667) requiring the giving of the name of the owner a statement was held sufficient although it described the owner in fee as being the equitable owner. *McHugh v. Slack*, 11 Wash. St. 227 (39 Pac. Rep. 674).

Sec. 508. Lien statement—Description of premises. Where a description of the premises is by metes and bounds and is erroneous, the notice is invalid. *Fernandez v. Burleson*, 110 Cal. 164 (42 Pac. Rep. 566). Filing with the statement, as an exhibit, a mortgage containing an accurate description of the premises was held sufficient. *Richlands Flint-Glass Co. v. Hildebeitel*, 92 Va. 91 (22 S. E. Rep. 806). Indefinite descriptions may be aided by extrinsic evidence under proper averments. *Smith v. Newbaur*, Ind. (42 N. E. Rep. 40). A description as "the north part" of

a specified lot in a named addition of a certain city, "as well as the one story frame dwelling house recently erected thereon by you," was held insufficient. *Maynard v. East*, 18 Ind. App. 482 (41 N. E. Rep. 889). Colo. Sess. Laws, 1889, p. 249, § 8, applied — service of notice on owner. *Union Pac. Ry. Co. v. Davidson*, 21 Colo. 98 (39 Pac. Rep. 1095). Under a statute (N. M. Comp. Laws 1884, § 1524) requiring the statement to contain "a description of the property to be charged with the lien sufficient for identification," it is held that, where a lien was sought to be enforced for the construction of a ditch, this statute was sufficiently complied with by giving a description of the land to be charged with the lien by government subdivision together with the description of the ditches the location of which are referred to a plan for the same filed with the statement. *Ford v. Springer Land Ass'n*, N. M. (41 Pac. Rep. 541). A description as "That certain three-story building No. —, situate and being in the city of Richmond, Va., on G street, between S and H streets, and the lot or piece of ground and curtilage appurtenant to the said building, fronting on the south side of G street 49 feet, and running back 156 feet, more or less, * * * of which Wirt E. Taylor is the owner or reputed owner," was held sufficient. Va. Code, 1887, §§ 2476, 2478, applied. *Taylor v. Netherwood*, 91 Va. 88 (20 S. E. Rep. 888). Where a lot was described as being in "Haney's" addition instead of "Henley's" addition to a certain town, the description was held sufficient as to owners of the property who had the building erected, when it appears that they suggested the filing of the lien, that there is no such lot as the former in the town, that the contractors had never erected any other building for them, and that they have not had any other building erected within the town within ten years. *Smith v. Newbaur*, Ind. (42 N. E. Rep. 40). A description giving the character, size, and name of a building, and its location by the number of the lots and frontage upon a certain street, was held sufficient although it contained an erroneous statement as to the name of the addition in which such lots are located. Hill's Wash. Code, Vol. 1., § 1667, construed. *McHugh v. Slack*, 11 Wash. St. 370 (39 Pac. Rep. 674).

Sec. 509. Lien statement—Statement of the contract and account. Under Ala. Code, § 3022, requiring the statement to contain “a just and true account of the demand secured by the lien, after all just credits have been given,” it is held that where the lien is claimed for materials and the statement shows the amount due, which amount it appears is admitted to be correct by the owner, it is sufficient. *Leftwich Lum. Co. v. Florence Mut. B. L. & S. Ass’n*, 104 Ala. 584 (18 So. Rep. 48). Citing, *Ainslie v. Cohn*, 16 Ore. 363 (19 Pac. Rep. 97); *Heston v. Martin*, 11 Cal. 41; *Brennan v. Swasey*, 16 Cal. 141 (76 Am. Dec. 507); *Selden v. Meeks*, 17 Cal. 129; *Lonkey v. Wells*, 16 Nev. 271; *Davis v. Hines*, 6 Ohio St. 473; *Gilman v. Gard*, 29 Ind. 291; *Bank v. Curtiss*, 18 Conn. 342. Where the work is contracted for as an entirety for a specific amount, and this is so set out in the account filed, all the information is given that is needed or can be reasonably required. *Taylor v. Netherwood*, 91 Va. 88 (20 S. E. Rep. 888). Citing, *Gunther v. Bennett*, 72 Md. 384 (19 Atl. Rep. 1048); *Young v. Lyman*, 9 Pa. St. 449; *Pool v. Wedemeyer*, 56 Tex. 287; *Heston v. Martin*, 11 Cal. 41; *France v. Woolston*, 4 Houst. 561; *Bank v. Curtis*, 18 Conn. 342; *King v. Smith*, 42 Minn. 286 (44 N. W. Rep. 65); *Leeds v. Little*, 42 Minn. 414 (44 N. W. Rep. 309); and *School Dist. v. Howell*, 44 Kan. 285 (24 Pac. Rep. 365). A statute (N. M. Comp. Laws 1884, § 1524) requiring the statement to contain “a statement of the terms, time given, and conditions of the contract,” is satisfied by filing a copy of the contract and referring to it. *Ford v. Springer Land Ass’n*, N. M. (41 Pac. Rep. 541). Under the statutes of Kansas the lien statement must not only state the amount claimed, but also include, as nearly as practicable, an itemized list of the materials furnished and the time when they were furnished. *Martin v. Burns*, 54 Kan. 641 (39 Pac. Rep. 177). Under a statute requiring the claimant to file “a just and true statement, or account or demand, setting forth the time when such material was furnished or labor performed, and containing a correct description of the property to be charged with the lien,” it is held that it is not necessary for the statement to show when the debt fell due. *Culver v. Scroth*, 153 Ill. 437 (39 N. E. Rep. 115). W. Va. Code, ch.

75, § 4, which requires a just and true account of the amount due after allowing all credits, to be sworn to and filed for record, uses the term "due" in the sense of an existing liability, without reference to whether it be then matured and enforceable by suit or not matured and not then enforceable by suit. *United States Blowpipe Co. v. Spencer*, 40 W. Va. 698 (21 S. E. Rep. 769). A statute (N. M. Comp. Laws 1884, § 1524) requiring the claimant to file "a claim containing a statement of his demands after deducting all just credits and offsets," is satisfied by a statement which alleges that a certain sum is "the balance due" the claimant "after deducting all just credits and offsets." *Ford v. Springer Land Ass'n*, N. M. (41 Pac. Rep. 541). A failure to give a proper credit, of which the lien claimant did not have exact information, will not invalidate the statement, no injury having resulted therefrom. *Rison v. Moon*, 91 Va. 384 (22 S. E. Rep. 165). It is not necessary for the statement to give the dates the various items of material were furnished if it sufficiently appears that such materials were furnished within the requisite time to entitle the claimant to a lien. *Chapman v. Brewer*, 43 Neb. 890 (62 N. W. Rep. 320). Where the statement of account shows that a period longer than the statutory time allowed for the filing of claim for a lien has elapsed between the two dates nearest together on which labor or materials were furnished, the presumption is that such labor was performed under two different contracts. *Hansen v. Kinney*, 46 Neb. 207 (64 N. W. Rep. 710); *Buchanan v. Selden*, 43 Neb. 559 (61 N. W. Rep. 732). Mass. Stat. 1892, Ch. 191 and Pub. Stat., Ch. 191, § 6, applied. *Border v. Mercer*, 163 Mass. 7 (39 N. E. Rep. 413).

A claim filed by a subcontractor which states that the owner, naming him, caused the building to be erected, and that certain persons designated as contractors made an oral agreement with him for the furnishing of materials, sufficiently states the contractual relations between the parties. *Sautter v. McDonald*, 12 Wash. St. 27 (40 Pac. Rep. 418). In Pennsylvania a subcontractor's lien statement should specify the items of account forming the basis of his claim and the time when the work was performed. *McFarland v. Schultz*, 168 Pa. 634 (32 Atl. Rep. 94). A notice of a lien claim, which

sets out a special contract between the claimant and the contractor to furnish the materials and to do the work necessary to the full completion of the painting of the building in accordance with the contract between the contractor and the owner, is sufficient without stating the value of each item. *Spears v. Lawrence*, 10 Wash. St. 868 (88 Pac. Rep. 1049; 45 Am. St. Rep. 789). A statement of a lien for materials reciting that "the ground on which the building was erected being at the time the property of H., who caused the said building to be erected by the said McL., her contractor and agent," was held sufficient. *Williamette S. M. L. & Mfg. Co. v. McLeod*, 27 Ore. 272 (40 Pac. Rep. 93).

Sec. 510. Lien statement—Mistakes and inaccuracies. Filing a lien statement for too great a sum will not invalidate the lien unless the mistake is intentional. *McMonagle v. Wilson*, 103 Mich. 264 (61 N. W. Rep. 495). Citing, Phil. Mech. Liens, § 336; *Lamont v. Le Fevre*, 96 Mich. 175 (55 N. W. Rep. 687); *Allen v. Smelting Co.*, 73 Mo. 693; *Hubbard v. Brown*, 8 Allen 593; *Nichols v. Culver*, 51 Conn. 180; *Kiel v. Carll*, Id. 440. Errors which do not affect the substantial rights of the parties and are made without intention to defraud any one do not invalidate the statement. *Peterman v. Milwaukee Brewing Co.*, 11 Wash. St. 199 (39 Pac. Rep. 452); *Hopkins v. Jamieson-Dixon Mill Co.*, 11 Wash. St. 308 (39 Pac. Rep. 815); *Culver v. Scroth*, 153 Ill. 437 (39 N. E. Rep. 115). A statute (Cal. Code Civ. Proc., § 1202), providing that any "person who shall wilfully include in his claim * * * work or materials not performed upon or furnished for the property described in the claim shall forfeit his lien," must be strictly construed, and in order to enforce a forfeiture thereunder the evidence should be clear and convincing that the violation was wilful and intentional. *Pacific Mut. L. Ins. Co. v. Fisher*, 106 Cal. 234 (39 Pac. Rep. 758). Under a statute (Ia. Code, § 2133) requiring the filing of "a just and true statement or account of the demand," a statement made and verified in good faith is sufficient although it contains unintentional errors. *Green Bay Lumber Co. v. Miller*, Ia. (62 N. W. Rep. 742). Where the amount demanded is correctly stated in the claim

for a lien, errors or omissions in a statement of account accompanying it do not vitiate the lien. *Chamberlain v. Hibbard*, 26 Ore. 428 (38 Pac. Rep. 437). Mistakes in matters not required to be in the statement are harmless. Mass. Pub. Stat., Ch. 191, § 6, applied. *Brosnan v. Trulson*, 164 Mass. 410 (41 N. E. Rep. 660). A mistake as to an immaterial date is harmless. *Pacific Mut. L. Ins. Co. v. Fisher*, 109 Cal. 566 (42 Pac. Rep. 154). An erroneous statement as to the date when the materials were furnished is harmless where it is made to appear that they were furnished within the requisite time to entitle the claimant to a lien. *Chapman v. Brewer*, 43 Neb. 890 (62 N. W. Rep. 320).

Sec. 511. Lien statement—Verification. A certificate of a notary certifying that the claimant “made oath to the correctness of the account,” is a sufficient compliance with Va. Code 1887, § 2476, requiring the statement to be verified by the oath of the claimant or his agent. *Taylor v. Netherwood*, 91 Va. 88 (20 S. E. Rep. 888). Where a statute (Mo. Rev. Stat. 1889, § 6709) requires the claimant’s statement to be verified by the oath of “himself or some credible person for him,” it is held that where the affidavit is made by another for the claimant it is not necessary that the fact of the agency be recited in the affidavit. *McLaughlin v. Schultz*, 125 Mo. 469 (28 S. W. Rep. 755). An affidavit by lien claimants that the account is correct and true, “to the best of their knowledge and belief,” is sufficient under Ala. Code, § 8022. *Florence Bldg. & Inv. Ass’n v. Schall*, 107 Ala. 531 (18 So. Rep. 108). The effect of the affidavit for the purpose of creating the lien is not affected by the fact that the affiant technically swears falsely as to his personal knowledge; and if the facts sworn to in fact exist, the lien is perfected. *Leftwich Lum. Co. v. Florence Mut. B. L. & S. Ass’n*, 104 Ala. 584 (18 So. Rep. 48). Where the verification is made before such an officer as the statute requires a certificate of his official capacity to accompany his acts, in order to give them authenticity, such certificate is necessary in the case of his attesting the verification of a mechanic’s lien. W. Va. Code, Ch. 75, § 4; Ch. 130, § 31, applied. *Lockhead v. Berkley Springs W. W. & Imp. Co.*, 40 W. Va. 553 (21 S. E. Rep. 1031). An affidavit that the

claim is "true" instead of "just," as provided by statute, was held sufficient. *Sautter v. McDonald*, 12 Wash. St. 27 (40 Pac. Rep. 418). A verification stating that the facts stated in the claim are true, is a sufficient compliance with the statute requiring an affidavit showing that the claim is true. *Corbett v. Chambers*, 109 Cal. 178 (41 Pac. Rep. 873). A verification of a lien statement by the claimant "that he had knowledge of the facts therein stated, and that the same were true," was held sufficient. Minn. Gen. Stat. 1894, § 6236, applied. *Nordine v. Knutson*, 62 Minn. 264 (64 N. W. Rep. 565). Verifications by one as the bookkeeper and treasurer of a corporation on its behalf, it appearing by the by-laws of such corporation that all its officers were required to be stockholders, is sufficient. *Chapman v. Brewer*, 43 Neb. 890 (62 N. W. Rep. 320). In Nebraska, it is held that an affidavit upon information and belief is sufficient. *Chapman v. Brewer*, 43 Neb. 890 (62 N. W. Rep. 320). Citing, *Finley v. West*, 51 Mo. App. 569. See, Contra, *Dorman v. Crozier*, 14 Kan. 177; *Corrugating Co. v. Thatcher*, 87 Ala. 458 (6 So. Rep. 366).

Sec. 512. Enforcement of lien—Complaint. Either the original notice of lien, or a copy thereof, must be filed with the complaint. *Davis v. McMillan*, 18 Ind. App. 424 (41 N. E. Rep. 851). A copy of notice filed with the complaint may be amended so as to conform to the original notice given, by striking out superfluous matter, the substantial rights of the parties not being affected thereby. *Clark v. Huey*, 12 Ind. App. 224 (40 N. E. Rep. 152). Where the complaint states sufficient evidence to create a personal liability on a building contract it will not be held insufficient because it does not allege that the defendant owns any interest in the real estate against which a lien is sought to be enforced. *Clark v. Maxwell*, 12 Ind. App. 199 (40 N. E. Rep. 274). A complaint to enforce a lien for materials which shows that the same were furnished to a stranger to the legal title is insufficient, where it fails to allege that they were furnished at the instance of the owner. *Cross v. Tscharnig*, 27 Ore. 49 (39 Pac. Rep. 540). Where the complaint alleges that the claim for a lien was filed within the statutory time after the completion of the building it need not positively allege the exact day

upon which the building was completed. *Wood v. Oakland & B. Rapid T. Co.*, 107 Cal. 500 (40 Pac. Rep. 806). It should show that the lien statement was filed within the time allowed by the statute. *J. D. Moran Mfg. Co. v. Clarke*, 59 Minn. 456 (61 N. W. Rep. 556).

Sec. 513. Enforcement of lien—Parties. In an action to foreclose a mechanic's lien the holders of other liens may be made parties and the rights of all adjusted in one suit. *Washington Rock-Plaster Co. v. Johnson*, 10 Wash. St. 445 (89 Pac. Rep. 115). In an action by a subcontractor to enforce a lien on a railroad the contractor is a proper party where it appears that the plaintiff's cause of action depends upon whether or not certain payments were made by the owner to the contractor before they were due under the contract. *Hilton Bridge Const. Co. v. N. Y. C. & H. R. R. Co.*, 145 N. Y. 890 (40 N. E. Rep. 86). In an action by a subcontractor, attorneys of the contractor who hold liens upon his title papers which can in no way affect the rights of plaintiff, are not necessary parties. *Hilton Bridge Const. Co. v. N. Y. C. & H. R. R. Co.*, 145 N. Y. 890 (40 N. E. Rep. 86). The beneficiary under a trust deed of the property against which the lien is sought to be enforced is a necessary party. *McClair v. Huddart*, 6 Colo. App. 498 (41 Pac. Rep. 832). Where the action is to enforce a lien against community property, the wife of the owner is a necessary party defendant. *Douthitt v. MacCulsky*, 11 Wash. St. 601 (40 Pac. Rep. 186). One against whom priority of lien is claimed should be made a party. *Johnson v. Bennett*, 6 Colo. App. 362 (40 Pac. Rep. 847). In an action to enforce the lien of a subcontractor the contractor should be made a party. *Union Pac. Ry. Co. v. Davidson*, 21 Colo. 98 (39 Pac. Rep. 1095). In California it is held that where the contract between the owner and the original contractor is void on account of not being recorded as required by the statute such original contractor is not a necessary although a proper party in an action to enforce a lien for materials. *Wood v. Oakland & B. Rapid T. Co.*, 107 Cal. 500 (40 Pac. Rep. 806).

Sec. 514. Enforcement of lien—Defenses. If the defendant has a claim for damages against the claimant who

claims full performance of his contract, on account of a breach thereof, he must assert it in the action or the claim is barred. *Riechert v. Krass*, 13 Ind. App. 848 (40 N. E. Rep. 706; 41 N. E. Rep. 885). A contractor cannot defend against the claim of a material man by showing that the property owner assumed the debt. *Aldritt v. Panton*, 17 Mont. 187 (42 Pac. Rep. 767). A defendant will not be permitted to claim the property as exempt from the lien as a homestead when he owned and occupied another house at the time of making the building contract. *McMonagle v. Wilson*, 103 Mich. 264 (61 N. W. Rep. 495).

Sec. 515. Enforcement of lien—Miscellaneous notes.

The right to a mechanic's lien must be determined by the law in force at the time the right becomes vested, but the lien must be established, or preserved and enforced by the law in force at the time the necessary proceedings are had for that purpose. *Groesbeck v. Barget*, 1 Kan. App. 61 (41 Pac. Rep. 204); Citing, *Moore v. Mausert*, 49 N. Y. 332; *Phillips v. Mason*, 7 Heisk. 61; *Tell v. Woodruff*, 45 Minn. 10 (47 N. W. Rep. 262); *Hill v. Lovell*, 47 Minn. 293 (50 N. W. Rep. 81); *Goodbub v. Estate of Hornung*, 127 Ind. 181 (26 N. E. Rep. 770); *Templeton v. Horne*, 82 Ill. 491; *Barton v. Steinwitz*, 37 Ill. App. 141; *Paine v. Woodworth*, 15 Wis. 298; *McCrea v. Craig*, 23 Cal. 522; *Forcht v. Short*, 45 Mo. 377; *Osborn v. Wall Paper Co.*, 99 Ala. 309 (13 South. Rep. 776). A change in the law as to the enforcement of mechanic's liens pending the work, but before the right of a mechanic's lien has accrued, affects the enforcement of the lien. *Orman v. Crystal River Ry. Co.*, 5 Colo. App. 493 (39 Pac. Rep. 434). But where the statute changing the proceedings to enforce a lien provides that all actions "now pending shall be proceeded with under the law as it exists at the time this act takes effect," it does not require actions subsequently brought to be proceeded with under the previous law. *Hopkins v. Jamieson-Dixon Mill Co.*, 11 Wash. St. 308 (39 Pac. Rep. 815).

A personal judgment may be rendered for the debt although the lien is found invalid. *Green Bay Lumber Co. v. Miller*, Ia. (62 N. W. Rep. 742); *Reynolds v. Randall*, Ga. (22 S. E. Rep. 577). A personal judgment may be rendered for a deficiency by a court of equity although

there is no statute expressly so providing. *Ford v. Springer Land Ass'n*, N. M. (41 Pac. Rep. 541). In an action to enforce a subcontractor's lien it is not error to enter a personal decree against the owner and the principal contractor where the owner has in his hands a sum, owing to the principal contractor, sufficient to discharge the lien. *Taylor v. Netherwood*, 91 Va. 88 (20 S. E. Rep. 888). Interest may be recovered from the time when the claimant had the right to enforce payment of his claim. *Pacific Mut. L. Ins. Co. v. Fisher*, 106 Cal. 224 (39 Pac. Rep. 758). A statute permitting the allowance of a reasonable attorney fee is constitutional. *Helena Steam-Heating & Supply Co. v. Wells*, 16 Mont. 65 (40 Pac. Rep. 78). Cal. Code Civ. Proc., § 1195, applied—allowance of attorney fees. *Pacific Mut. L. Ins. Co. v. Fisher*, 106 Cal. 224 (39 Pac. Rep. 758); *Clancy v. Plover*, 107 Cal. 272 (40 Pac. Rep. 394). A single lien may be enforced for materials furnished a contractor and a subcontractor for use in the same building. *Smith v. Newbaur*, Ind. (42 N. E. Rep. 40). The lien is not destroyed by an order staying execution of the judgment foreclosing it. *Leftwich Lum. Co. v. Florence Mut. B. L. & S. Ass'n*, 104 Ala. 584 (18 So. Rep. 48). Where a statute simply gives a lien but does not provide any machinery for its enforcement such a lien can only be enforced by an action in equity. Ala. Code, § 3018, construed. *Nunnally v. Dorand*, Ala. (18 So. Rep. 5). Property upon which a mechanic's lien is sought to be enforced is under the exclusive control of the court until such proceeding is determined. *Rodgers & Baldwin H. Co. v. Cleveland Bldg. Co.*, Mo. (32 S. W. Rep. 1). Under Mo. Rev. Stat. 1889, § 6159, a justice of the peace has jurisdiction to enforce a mechanic's lien. *McLaughlin v. Schultz*, 125 Mo. 469 (28 S. W. Rep. 755). Mass. Pub. Stat., Ch. 191, § 11; Stat. 1893, Ch. 396, applied—venue in mechanics' lien cases. *Boyle v. Gould*, 164 Mass. 144 (41 N. E. Rep. 114). In construing Mass. Pub. Stat., Ch. 191, § 1, giving a lien upon a building erected, "and upon the interest of the owner thereof in the lot of land upon which the same is situated," it is held that a lien claimant cannot, at his option, enforce his lien on a part only of the whole lot. *Whalen v. Collins*, 164

Mass. 146 (41 N. E. Rep. 124). Under Ill. Rev. Stat. 1893, Ch. 82, § 28, an action to foreclose a mechanic's lien must be brought within two years after filing the claim. *McIntosh v. Schroeder*, 154 Ill. 520 (39 N. E. Rep. 478). The question of the sufficiency of the description of the property in a decree foreclosing a mechanic's lien cannot be raised for the first time on appeal. *Indiana Racing Ass'n v. Allen*, 140 Ind. 437 (39 N. E. Rep. 669). In Indiana, a jury trial cannot be demanded in the action although the defendant files a counter claim for damages against the claimant. *Reichert v. Krass*, 13 Ind. App. 348 (40 N. E. Rep. 706; 41 N. E. Rep. 835). Where a contractor abandons a building on account of the default of the owner and subsequently brings a suit to enforce a mechanic's lien for work done and damages suffered, the title to unused material belonging to such contractor and left on the premises is not affected by the judgment declaring the lien, in the absence of a special allegation to recover the value of such material. *Porter & Blair Hardware Co. v. Lee*, 105 Ala. 361 (17 So. Rep. 216). Where several actions to enforce liens against community property were consolidated, and the wife of the owner, although not made a party to the proceedings, had full knowledge and participated in the trial, it was held that she is bound by the decree. *Douthitt v. MacMulsky*, 11 Wash. St. 601 (40 Pac. Rep. 186). A proceeding to enforce a mechanic's lien does not involve a freehold within the meaning of Colo. Sess. Laws 1891, p. 118, regulating appeals. *McCandless v. Green*, 20 Colo. 519 (39 Pac. Rep. 64). In a consolidated action to enforce several liens against the same defendant, a judgment sustaining a demurrer to the complaint of one of the plaintiffs is as to him a "final judgment" for the purpose of appeal. *Orman v. Crystal River Ry. Co.*, 5 Colo. App. 493 (39 Pac. Rep. 434). Where the lien statement and the complaint to enforce the lien allege a contract to pay the claimant so much per day and the proof shows that the contract was to pay what the services were reasonably worth, which was shown to be a less rate than the one alleged, the variance was held to be fatal. *Jones v. Shuey*, Cal. (40 Pac. Rep. 17). Minn. Gen. Stat. 1894, § 6238, applied—filing of *lis pendens* notice. *John Paul Lumber Co. v. Hormel*, 61 Minn. 303 (63 N. W. Rep. 718).

Under a statute (Mich. Pub. Acts 1893, No. 199, § 9) which provides that a lien shall continue only for a specified time from the filing thereof unless proceedings are brought to enforce it, it is held that the time must be computed from the time of the filing of the claim for a lien to the date of filing the proceedings to enforce, and not to the time of service of process. *Hannah & Lay Mercantile Co. v. Mosser*, Mich. (62 N. W. Rep. 1120). Where the action is by a subcontractor against contractors liable jointly the action may proceed upon the service of process upon one of such contractors, the judgment being made enforceable against the joint property of both and the separate property of the one served. *Julius v. Callahan*, Minn. (65 N. W. Rep. 267).

Sec. 516. Miscellaneous notes. A mechanic's lien is of statutory creation. *Sayre-Newton L. Co. v. Union Bank*, 6 Colo. App. 541 (41 Pac. Rep. 844); *United States Blowpipe Co. v. Spencer*, 40 W. Va. 698 (21 S. E. Rep. 769); and the provisions of a statute cannot be enlarged by contract. *Johnson v. Bennett*, 6 Colo. App. 362 (40 Pac. Rep. 847). A substantial compliance with the requisites of the statutes is necessary to its enforcement. *F. A. Drew Glass Co. v. Eagle Mill Co.*, 1 Kan. App. 614 (42 Pac. Rep. 387), but such a compliance with the statute is all that is required. *United States Blowpipe Co. v. Spencer*, 40 W. Va. 698 (21 S. E. Rep. 769). A statute giving a lien to "any person" applies to corporations, both domestic and foreign. *Chapman v. Brewer*, 43 Neb. 890 (62 N. W. Rep. 320). The right to a lien is determined by the law existing at the time of the performance of the labor or the furnishing of the materials, and is a vested right which the legislature cannot destroy. *Groesbeck v. Barget*, 1 Kan. App. 61 (41 Pac. Rep. 204). After the commencement of a building for which a lien is claimed a change of ownership of the property does not affect the same. *Wanganstein v. Jones*, 61 Minn. 262 (63 N. W. Rep. 717). The right to a lien on the land is not affected by the destruction of the building. *Smith v. Newbaur*, Ind. (42 N. E. Rep. 40). Whenever the person entitled to the lien is prevented by the act of the owner of the property from complying with the law, such act will excuse the nonperformance

of the duty enjoined by the statute. *Warner Ele. Mfg. Co. v. Maverick*, 88 Tex. 489 (80 S. W. Rep. 437). A perfected lien is assignable. *The Victorian Number Two*, 26 Ore. 194 (41 Pac. Rep. 1103; 46 Am. St. 616); and under Ala. Code, § 8047, the right to a mechanic's lien may be assigned. *Leftwich Lum. Co. v. Florence Mut. B. L. & S. Ass'n*, 104 Ala. 584 (18 So. Rep. 48). One who waives his right to a statutory lien by furnishing material and taking the notes of the purchaser, which reserve title in the seller until the material is paid for, may enforce an equitable lien on the property where such materials were used. *Ross v. Perry*, 105 Ala. 583 (16 So. Rep. 915). The right to a lien is not affected by the fact that the debt for which it is claimed has been reduced to a judgment. *United States Blowpipe Co. v. Spencer*, 40 W. Va. 698 (21 S. E. Rep. 769).

Sec. 517. Miscellaneous notes—Construction of statutes. A mechanic's lien statute will not be given a retrospective effect. *Spangler v. Green*, 21 Colo. 505 (42 Pac. Rep. 674). Mechanic's lien statutes will be liberally construed. *Ford v. Springer Land Ass'n*, N. M. (41 Pac. Rep. 541), overruling *Finane v. Hotel Co.*, 3 N. M. 256 (5 Pac. Rep. 725). *United States Blowpipe Co. v. Spencer*, 40 W. Va. 698 (21 S. E. Rep. 769); *Clark v. Huey*, 12 Ind. App. 224 (40 N. E. Rep. 152); *Shaw v. Young*, 87 Me. 271 (32 Atl. Rep. 897). Ind. Rev. Stat. 1894, § 7257 giving a lien to persons furnishing labor or material provided they file a notice of their intention to hold such lien within sixty days "after performing such labor or furnishing such material," is constitutional. *Smith v. Newbaur*, Ind. (42 N. E. Rep. 40). Where a statute gives a lien for labor furnished a contractor may charge a profit on his own labor and the labor of others above the market price, it appearing that the labor furnished is worth the amount charged. *Border v. Mercer*, 163 Mass. 7 (39 N. E. Rep. 413). A bond given by a contractor under Kansas Laws 1889, Ch. 168, § 13, conditioned for the payment of all claims which might be the basis of liens, or which might arise or grow out of the contract, and the performance and completion of the work thereunder, is a substitute for the statutory liens, to which laborers and mate-

rial men are entitled where no bond is given; and where such bond is given, no lien can thereafter attach, and any which may have attached or have been filed is discharged. *Risse v. Hopkins Planing Mill Co.*, 55 Kan. 518 (40 Pac. Rep. 904). Cal. Code Civ. Proc., § 1184, providing that "every person who performs labor upon any mining claim has a lien upon the same," is held not to authorize a lien for labor in working a mine on lands held under an agricultural patent from the United States. *Morse v. DeAdro*, 107 Cal. 622 (40 Pac. Rep. 1018). Under Minn. Gen. Laws 1889, Ch. 200, § 5, which provides that where improvements are made on the land of another with his knowledge a lien may be enforced against the land therefor unless such owner shall, within five days after he shall have obtained knowledge of such improvements serve a written or printed notice upon the parties making the same to the contrary, it is held that knowledge of the making of improvements given to the agent of the owner who has general control of the buildings, leases the same, collects the rent, and cares for and looks after them, is sufficient knowledge to the owner to impose upon him the obligation of giving the notice required by the statute. *Jefferson v. Leithauser*, 60 Minn. 251 (62 N. W. Rep. 277). The right to a mechanic's lien given by Tex. Const., Art. 16, § 37, is not affected by a lack of proper description of the real estate in the building contract. *Myers v. Houston*, 88 Tex. 126 (30 S. W. Rep. 912). Ala. Acts, 1890-91, p. 578, held unconstitutional. *Randolph v. Builders' & Painters' Supply Co.*, 106 Ala. 501 (17 So. Rep. 721). Fla. Acts, 1887, Ch. 3747, applied—farm laborer's lien—enforcement. *Hume v. Simmons*, 34 Fla. 584 (16 So. Rep. 552). Mass. Pub. Stat., Ch. 191, §§ 1, 2, construed. *Bowen v. Phinney*, 162 Mass. 593 (39 N. E. Rep. 283). N. Y. Laws, 1885, Ch. 342, § 24, subd. 6, construed and applied—discharge of lien by bond of owner—rights of parties. *Morton v. Tucker*, 145 N. Y. 244 (40 N. E. Rep. 8). Pa. Act, June 16, 1836; Act, April 21, 1856; Act, May 18, 1887, construed and applied. *Wheeler v. Pierce*, 167 Pa. 416 (31 Atl. Rep. 649; 46 Am. St. Rep. 679). Wash. Code, 1881, § 1978, construed and applied—enforcement of lien on crops by farm laborers. *Pain v. Isaacs*, 10 Wash. St. 173 (88 Pac. Rep. 1038).

MINES.

EPITOME OF CASES.

Sec. 518. Gas and oil — Nature of property in. In applying Ind. Rev. Stat. 1881, §§ 5116, 5117 (2 Ballards' Annual, § 898), which provide that a married woman cannot convey or incumber her real estate, except her husband join in a deed with her, it is held that she cannot alone give rights to oil and gas in her land, with privilege to dig wells, lay pipes, etc., for the purpose of removing it. *Columbia Oil Co. v. Blake*, 18 Ind. App. 680 (42 N. E. Rep. 234). The court say: "That natural gas and oil, after they are brought to the surface from their natural reservoirs under the soil, are personal property, we think clear, but whether it is to be considered as a part of the real estate while in the earth is the question presented by these answers; for, if it is a part thereof, appellee could not, without her husband joining, make a valid contract which would take away or diminish the value of the real estate itself. That growing timber, stone before quarried, and coal, lead and iron before mined, are a part of the realty itself, is so well settled that we deem it unnecessary at this time to cite authorities. Oil and gas are natural products, and their source is in the soil or rocks of the earth. True, they are, like water, liquid in their nature, and they are also, like water, mineral. It is said that water, oil, and gas should be classed by themselves, and are termed 'minerals *feræ naturæ*.' In *Gas Co. v. De Witt*, 130 Pa. St. 235, 249 (18 Atl. Rep. 724) it is said: 'Gas, it is true, is a mineral; but it is a mineral with peculiar attributes, which require the application of precedents arising out of ordinary mineral rights with much more careful consideration of the principles involved than of the mere decisions. Water, also, is a mineral; but the decisions in ordinary cases of mining rights, etc., have never been held as unqualified precedents in regard to flowing, or even to

percolating, waters. Water and oil, and still more strongly gas, may be classed by themselves, if the analogy be not too fanciful, as minerals *feræ naturæ*. In common with animals, and unlike other minerals, they have the power and the tendency to escape without the volition of the owner. Their "fugitive and wandering existence within the limits of a particular tract is uncertain," as said by Chief Justice Agnew in *Brown v. Vandergrift*, 80 Pa. St. 147, 148.' The adjudications seem to be that on account of the fugitive and wandering existence of gas, oil, and water in the earth, they are not subject to absolute ownership; that they belong to the owner of the land, and form a part of the land itself, so long as they are in or on the land, but when they escape and go into or upon other land, his title thereto is lost. In *Gas Co. v. De Witt*, 180 Pa. St. 235, 249 (18 Atl. Rep. 724), the court say: 'They belong to the owner of the land, and are a part of it, so long as they are on or in it, and are subject to his control; but when they escape, and go into other land, or come under another's control, the title of the former owner is gone. Possession of the land, therefore, is not necessarily possession of the gas. If an adjoining or even a distant owner drills his own land and taps your gas, so that it comes into his well and under his control, it is no longer yours, but his.' While oil and gas remain in the earth within their natural reservoirs or pockets, they are parts of the realty itself, as much as are stone, coal, lead, or iron, or any other solid or substantive mineral; and the sale of the real estate carries with it the ownership to all that lies beneath the soil, which, in case it be stone, coal, lead, or iron, vests in the purchaser the absolute ownership therein; while, if there is water, oil, or gas in or on the land, the purchaser's ownership therein is absolute so long as it remains in or on his land, but when it escapes therefrom it is lost. In this view of the case, if appellee could sell the gas or oil which might be found in or under her real estate without her husband joining with her, she could also sell the stone, coal, lead, and iron which might be found there, or even the soil itself; thus, if not parting with, in fact destroying, the real estate itself."

Sec. 519. Mining leases. A contract by a landowner assigning his right to all minerals upon certain lands to another to "farm" and granting such assignee a right of way over such lands, the consideration being a certain per cent. of the profits, is a mining lease which is forfeited by failure on the part of the lessee to mine the minerals within a reasonable time. *Shenandoah L. & A. Coal Co. v. Hise*, 92 Va. 238 (23 S. E. Rep. 303). A contract, designated by itself as a "lease" to continue for ninety-nine years, giving one a right to enter on land and test it for minerals and oil, and erect buildings and machinery for mining, for a specified sum if no minerals were mined, and royalty on all ores shipped, was held a lease and not a revocable license. *Young v. Ellis*, 91 Va. 297 (21 S. E. Rep. 480). Where the payment of rent by a mining lessee is prevented by the lessor purposely avoiding him an extension of time may be given for such payment. *Young v. Ellis*, 91 Va. 297 (21 S. E. Rep. 480).

Sec. 520. Construction of mining leases. Where two persons owning in severalty two adjoining tracts of land execute a joint lease of the same in which the lessee agrees to pay to them monthly a certain sum per ton for the minerals mined, and one of such owners subsequently conveys his tract of land to the lessee, the remaining lessor is entitled to royalty thereafter in an amount equal to the value of his distant tract as compared with that conveyed to the lessee independent of what tract the minerals were taken from. *Higgins v. California Pet. & Asph. Co.*, 109 Cal. 304 (41 Pac. Rep. 1087). A mining lease which provides that it shall be void if "the enterprise shall be abandoned twelve months" is avoided by the failure of the lessee to commence mining operations within twelve months after the lease commences, and the fact that the delay was occasioned by the lack of railroad facilities is immaterial. *Woodward v. Mitchell*, 140 Ind. 406 (39 N. E. Rep. 437). A "ton," in an agreement to pay so much royalty per "ton" will be construed to mean two thousand pounds, no provision to the contrary appearing in the lease. Cal. Code, § 3215, applied. *Higgins v. California Pet. & Asph. Co.*, 109 Cal. 304 (41 Pac. Rep. 1087). For construction of particular oil and gas leases, see, *Stahl v. Van Vleck*, 53 O.

St. 136 (41 N. E. Rep. 35); *Columbian Oil Co. v. Blake*, 13 Ind. App. 680 (42 N. E. Rep. 234); *Balfour v. Russell*, 167 Pa. 287 (31 Atl. Rep. 570). For construction of particular leases as to the method of calculating royalties, see, *Nunnally v. Warner Iron Co.*, 94 Tenn. 282 (29 S. W. Rep. 124); *Higgins v. California Pet. & Asph. Co.*, 109 Cal. 304 (41 Pac. Rep. 1087). For construction of particular assignment of lease as to liability of assignee for assessments, see, *Shaw v. Horner*, 7 Colo. App. 83 (42 Pac. Rep. 689).

Sec. 521. Miscellaneous notes. A promise to pay a debt out of proceeds of ore to be mined is not an equitable assignment of such proceeds. *Silent Friend Min. Co. v. Abbott*, 7 Colo. App. 78 (42 Pac. Rep. 318). A deed of "mineral ores" does not include granite, but the words "minerals and ores" include granite except where other provisions show that the conveyance is limited to such "minerals and ores" as are to be got by mining in the ordinary sense of that term; that is by underground, and not by open, workings. *Armstrong v. Lake Champlain G. Co.*, 147 N. Y. 495 (42 N. E. Rep. 186; 49 Am. St. Rep. 688). See opinion for collection of authorities defining "mineral ores" and "minerals and ores." As to what amounts to a mining partnership under § 2512 of the Cal. Civ. Code, see *Berry v. Woodburn*, 107 Cal. 504 (40 Pac. Rep. 802). For mining on public lands, See Public Lands.

MORTGAGES.

EPITOME OF CASES.

Sec. 522. Formal requisites—Execution. A *de facto* corporation may execute a binding mortgage. *McTighe v. Macon Trust Co.*, 94 Ga. 306 (21 S. E. Rep. 701; 47 Am. St. Rep. 153). A mortgage by a guardian executed in a manner provided for by statute is not invalidated by reason of the fact that such guardian had not previously given bond at the time of his appointment as required by statute. Kan. Gen.

Stat. 1889, Ch. 46, § 7, construed. *Hunt v. Insley*, 56 Kan. 213 (42 Pac. Rep. 709). A mortgage executed by one so intoxicated as to be without consenting capacity will be set aside. *Hale v. Stery*, 7 Colo. App. 165 (42 Pac. Rep. 598). The lapse of a few hours or of a few days between the execution of the note and mortgage is immaterial, providing that their execution was with reference to each other, and as a part of a single negotiation or transaction. *Parke v. Frahm*, 54 Kan. 676 (39 Pac. Rep. 185). A conveyance of real property to a third party in trust as security for a debt which by its terms provides that the trust is to be executed by the creditor, and in which the trustee, in case of default, is authorized to perform no act in relation to the property described in such instrument, operates as a mortgage, in accordance with the expressed intention of the parties thereto. *Merrill v. Hurley*, S. Dak. (62 N. W. Rep. 958). Where the execution of a mortgage by a husband and wife is procured by threats of prosecution and immediate imprisonment of the husband, if the mortgage is not executed, such threats causing them to do what they would not have otherwise voluntarily done, said mortgage may be set aside for duress. *Hargraves v. Korcek*, 44 Neb. 660 (62 N. W. Rep. 1086). Particular facts held insufficient to show that a mortgage was procured by duress. *Hargraves v. Menken*, 45 Neb. 668 (63 N. W. Rep. 951). Extending time to a son for the repayment of money embezzled by him was held to be a sufficient consideration for a mortgage executed by his father to secure the payment of such money. *Saalfeld v. Manrow*, Pa. St. (30 Atl. Rep. 823). In Florida it is held that a mortgage made payable to one or the other of two named payees is valid and may be enforced. *Seedhouse v. Broward*, 34 Fla. 509 (16 So. Rep. 425). As to delivery of mortgage, see Delivery of Deeds.

Sec. 523. Equitable mortgage. Where a company executed its bonds or debentures, which contained the following: "The company hereby charges with such payment (of the debentures) its undertaking, all its property whatsoever and wheresoever, both present and future," it was held that as, between the parties, this created an equitable mortgage.

which might be enforced. *Howard v. Iron & Land Co.*, 62 Minn. 298 (64 N. W. Rep. 896). The court say: "Every express agreement in writing, whereby the party clearly indicates an intention to make some particular property therein described a security for a debt, creates an equitable lien upon the property which is enforceable. The form of the writing is not important, provided it sufficiently appears that it was thereby intended to create a security. If that intention appears, it will create a mortgage in equity, or a specific lien on the property so intended to be mortgaged. Pom. Eq. Jur. §§ 1235, 1236; *Payne v. Wilson*, 74 N. W. Rep. 348; *Daggett v. Rankin*, 81 Cal. 321; *Canal Co. v. Vallette*, 21 How. 414. The language 'hereby charges with such payment all its property whatsoever and wheresoever, both present and future,' clearly expresses a present purpose to pledge all the company's property for the payment of the debentures, and also the intention to effect that purpose by the writing itself. That was sufficient. In order to create a valid lien, at least as between the parties, it was not necessary to particularly and specifically describe the property. From the nature of the mortgage, that was impossible. The description, 'all its property whatsoever and wheresoever, both present and future,' sufficiently describes and identifies the property intended to be mortgaged. *Wilson v. Boyce*, 92 U. S. 320."

• **Sec. 524. Description of debt.** A provision in a mortgage that is given "to secure any notes that may be given for renewal of said notes, or any part thereof, or for any interest thereon," the notes referred to by the words "said notes" not being described, was held an insufficient description of the indebtedness. *Bowen v. Ratcliff*, 140 Ind. 393 (39 N. E. Rep. 860; 49 Am. St. Rep. 203). The debt to be secured by a deed of trust or mortgage need not be specifically described; and where deeds of trust are taken on distinct portions of the land conveyed, to secure a certain amount of the bonds given for the purchase price, the fact that the deeds fail to state which of the bonds are secured by each deed does not render the deeds invalid, but they will all be marshaled as security for all the bonds. *Winner v. Lippincott Inv. Co.*, 125 Mo. 528 (28 S. W. Rep. 998).

Sec. 525. Construction of mortgages. In the construction of a mortgage the mortgagor is to be favored rather than the mortgagee. *Bowen v. Ratcliff*, 140 Ind. 393 (39 N. E. Rep. 860; 49 Am. St. Rep. 203). As to the debt and matters incident the provisions of the note control those of the mortgage. *Keys v. Lardner*, 55 Kan. 331 (40 Pac. Rep. 644). A note and mortgage executed at the same time and as one transaction are to be construed together, and so far as possible, construed as one instrument. *Swearingen v. Lahner*, Ia. (61 N. W. Rep. 431; 26 L. R. A. 765). Citing, *Noell v. Gaines*, 68 Mo. 649; *Chambers v. Marks*, 98 Ala. 412 (9 So. Rep. 74); *Manufacturing Co. v. Howard*, 28 Fed. 741; *Schoonmaker v. Taylor*, 14 Wis. 313; *Santclift v. Norton*, 11 Kan. 218; *Mallory v. Railroad Co.*, 35 N. Y. Super. Ct. 174; *Lantry v. French*, 33 Neb. 524 (50 N. W. Rep. 679); *Clayton v. Whitaker*, 68 Ia. 412 (27 N. W. Rep. 296); *Sloat v. Bean*, 47 Ia. 60; *Dobbins v. Parker*, 46 Ia. 357; *Dean v. Ridgeway*, 82 Ia. 757 (48 N. W. Rep. 923); *Bank v. Griffin*, 54 Iowa, 749 (6 N. W. Rep. 155); *Kramer v. Rebman*, 9 Iowa, 114. The mortgage executed by a borrowing member of a building association contained, among other conditions, a stipulation for the payment of such "assessments" as might be levied on him as a member. Losses occurred, and the association became insolvent, whereupon a receiver was appointed to wind up its affairs, who ascertained the "shortage" in the assets, and made a *pro rata* assessment on the members to meet the same. *Held*, that an assessment for such purpose is within the above stipulation of the mortgage, and that the member is not entitled to its cancellation until paid. *Held*, further, that in such case the receiver is the proper person to ascertain the amount of the losses, and to make an assessment on the members to meet the same. *Eversman v. Schmitt*, 53 O. St. 174 (41 N. E. Rep. 139).

Sec. 526. Title and right to possession. A mortgage on real estate does not pass any title or interest in the land but creates a lien upon whatever interest the mortgagor may have. *Lane v. Woodruff*, 1 Kan. App. 241 (40 Pac. Rep. 1079). Under Cal. Civ. Code, § 2927, providing that "a mortgage does not entitle the mortgagee to the possession of the prop-

erty, unless authorized by the express terms of the mortgage," it is held that a mortgagee taking possession without authority after the death of the mortgagor is liable to the mortgagor for rent, although the mortgage included the rents, such mortgagee having taken no steps to reach the rents through the intervention of the court, and having obtained judgment of foreclosure for the full amount of his claim under a complaint expressly waiving recourse against any other property of the deceased mortgagor than the mortgaged premises. *Freeman v. Campbell*, 109 Cal. 360 (42 Pac. Rep. 85). Under Minn. Gen. Stat. 1894, § 5861, providing that "a mortgage of real property is not to be deemed a conveyance, so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure," it is held that a stipulation in a mortgage empowering the mortgagee to collect rents and profits of the mortgaged premises and apply them to the payment of the debt is invalid, but such a stipulation in regard to the collection of rents by the mortgagee and applying the same to the payment of taxes and insurance on the property will be upheld. *Cullen v. Foote*, 60 Minn. 6 (61 N. W. Rep. 818). Ordinarily, unless he consents, the mortgagor cannot be deprived of his right to possession until foreclosure and expiration of the time for redemption, but in a recent case a stipulation in a mortgage executed to a trustee for the benefit of the mortgagor's creditors by which the trustee could, upon the happening of certain events, take possession of the property and manage the same, was held valid and enforceable by a court of equity. *Michigan Trust Co. v. Lansing L. Co.*, 103 Mich. 392 (61 N. W. Rep. 668). In Illinois it is held that a mortgagee in a mortgage of the statutory form in which the mortgagor "mortgages and warrants," may maintain an action of ejectment, after condition broken, against the mortgagor or any other person in possession of the mortgaged premises. *Esker v. Hefferman*, 159 Ill. 38 (41 N. E. Rep. 1113). A mortgagee in possession cannot be ejected by a mortgagor until the debt has been paid. *Hildreth v. James*, 108 Cal. 240 (41 Pac. Rep. 299); but he may be ejected after payment of the debt by the mortgagor. *Crouse v. Binkley*, 167 Pa. 182 (31 Atl. Rep. 551). In Maine it is held that a mortgagee of real estate, in the absence of an

agreement to the contrary, has the right at any time to take possession of the mortgaged premises, if he can obtain it peaceably, and to take the crops that may be growing thereon, and apply the proceeds therefrom to the mortgage debt. *Bangor Sav. Bank v. Wallace*, 87 Me. 28 (82 Atl. Rep. 716). In New Jersey it is held that a statute (Supp. Rev. p. 490, pl. 6) providing, "That in all cases where a bond and mortgage has or may hereafter be given for the same debt, all proceedings to collect said debt shall be first, to foreclose the mortgage," etc., does not prevent the mortgagee from maintaining ejectment. *Mershon v. Castree*, 57 N. J. L. 484 (81 Atl. Rep. 602).

Sec. 527. Power of mortgagor to abandon an appurtenant easement. Under Md. Code, art. 66, § 11, providing that a mortgage sale, "when confirmed by the court and the purchase money is paid, shall pass all the title which the mortgagor had in said mortgaged premises at the time of the recording of the mortgage," a mortgagor cannot before default, without the consent of the mortgagee, abandon an easement appurtenant to the mortgaged land, and expressly included in the mortgage, so as to bind a purchaser at a sale under the mortgage, even if the security is not ultimately impaired by the abandonment. *Duval v. Becker*, 81 Md. 537 (82 Atl. Rep. 308). The court say: "The equity doctrine that a mortgage is a mere security for the debt and only a chattel interest has by a gradual progress been adopted by the courts of law, and the harshness of the common law, which looked to form only, and treated a mortgage after condition broken as in all respects an absolute conveyance, has been materially mitigated. Phelps, Jud. Eq., § 196. Hence, as stated by Chancellor Kent (4 Comm. 160), 'except as against the mortgagee, the mortgagor, while in possession and before foreclosure, is regarded as the real owner.' He has, therefore, an insurable interest in the property. *Insurance Co. v. Kelley*, 32 Md. 421; and may recover damages for injuries done thereto, *Railroad Co. v. Gantt*, 39 Md. 140; *Arnd v. Amling*, 53 Md. 200; and, notwithstanding a default, is permitted to redeem in equity, *Bank v. Lanahan*, 45 Md. 407. But, whatever his relation to the property may be as

respects third persons, the doctrine that he is regarded as the real owner of the mortgaged property is subject to the express qualification that the mortgagee is not included. The doctrine applies, 'except as against the mortgagee.' As between the mortgagor and mortgagee, 'by the legal, formal mortgage, * * * the property is conveyed or assigned by the mortgagor to the mortgagee, in form like that of an absolute legal conveyance, but subject to a proviso or condition, * * * and upon nonperformance of this condition, the mortgagee's conditional estate becomes absolute at law, and he may take possession thereof, but it remains redeemable in equity during a certain period.' *Bank v. Lanahan*, 45 Md. 407; *Famieson v. Bruce*, 6 Gill & J. 72 (26 Am. Dec. 557); *Evans v. Merriken*, 8 Gill & J. 89. And in the recent case of *Cahoon v. Miers*, 67 Md. 576 (11 Atl. Rep. 278), where the question was whether the offspring born of mortgaged livestock after the execution of the mortgage belonged to the mortgagor or to the mortgagee, the late Judge Miller, speaking for this court, said that our predecessors, in deciding the case of *Evans v. Merriken*, 8 Gill & J. 89, rested their conclusion upon the legal effect and operation of the mortgage as between the mortgagor and mortgagee. 'They said,' continues the opinion in *Cahoon v. Miers*, 'and upon ample authority, that a mortgage does something more than merely create a lien for the debt; that upon its execution the legal estate becomes immediately vested in the mortgagee, and the right of possession follows as a consequence; * * * that this legal estate is defeasible at law upon the payment of the mortgage debt at the time stipulated, but, if this is not done, then it becomes indefeasible at law, and defeasible only in equity. * * *

From this view of the nature and effect of a mortgage, they say, it results that the mortgagee must be considered as having an estate or interest in the subject matter of the mortgage, not absolute, it is true, because such an estate is not imported by the terms of the instrument, but an interest commensurate with the object contemplated to be attained by it as a security for the payment of the debt. * * * But, at law, the title all the while is in the mortgagee. * * * That decision (8 Gill. & J. 89) has been acquiesced in and recognized as the law of the state for more than half a century, and we see no

good reason for overruling it now.' As between the mortgagor and mortgagee, therefore, the doctrine that the mortgagor is regarded as the real owner does not, and in view of the quality of the estate conveyed by the mortgage cannot, obtain to the extent of permitting the mortgagor, by his own act, to exempt from the lien and operation of the mortgage any part of the mortgage property. It gives him no authority to dismantle the mortgaged estate of its appurtenant easement, and no power to force the mortgagee to accept as security for the payment of the debt anything less than the entire estate originally granted. After the mortgage has been executed and delivered, and the security it was intended to afford has been accepted, it does not lie within the power of the mortgagor to withdraw or to cut out from the lien thus created any portion of the property actually conveyed. A contrary doctrine, as between the mortgagor and mortgagee, would jeopardize, if it did not wholly destroy, the stability or every mortgage security; and there is neither principle nor precedent to justify its adoption. It would lead to endless confusion, and would cause the mortgagee's lien, whose range and latitude ought to be fixed by the mortgage itself, to depend, in a large measure, upon, and to be gauged as to its scope by, the accidental circumstance that the property, as stripped of its appurtenant easements, might happen to sell, when sold under foreclosure, for sufficient to pay the mortgage debt, instead of allowing the lien to cover, during the whole period the mortgage remains in force, the precise property originally conveyed."

Sec. 528. After-acquired property. A railroad company may mortgage its after-acquired property. *Mc Tighe v. Macon Const. Co.*, 94 Ga. 806 (21 S. E. Rep. 701; 47 Am. St. Rep. 153). In Massachusetts it is held that a mortgage of after-acquired property is not effectual as against the attaching creditors or assignees in insolvency of the mortgagor, unless the mortgagee has taken possession of the property. *Harriman v. Woburn Elec. Light Co.*, 163 Mass. 85 (39 N. E. Rep. 1004).

Sec. 529. Mortgage to secure advances. Notes given for advancements made after the execution of a mort-

gage, and on the faith thereof, were held enforceable under a statement in the mortgage that it was given to secure certain described indebtedness "or other indebtedness due, or that may hereafter become due," although the description given for the main indebtedness was held insufficient. *Bowen v. Ratcliff*, 140 Ind. 393 (39 N. E. Rep. 860; 49 Am. St. Rep. 203). In California it is held that "the lien of the mortgage cannot be enforced against subsequent incumbrancers, of which the mortgagee has actual notice, for advances or indorsements made or given after such notice. The notice must be actual. Constructive notice, by the recording of subsequent incumbrances is not enough." *Savings & Loan Soc. v. Burnett*, 106 Cal. 514 (39 Pac. Rep. 922).

Sec. 530. Deeds construed as mortgages. Whatever be the form of the transaction if its primary object is to secure the payment of money, it will be treated as a mortgage. *Anderson v. Smith*, 103 Mich. 446 (61 N. W. Rep. 778); *Dunton v. McCook*, Ia. (61 N. W. Rep. 977); *State Bank v. Mathews*, 45 Neb. 659 (63 N. W. Rep. 930); *Mears v. Strobach*, 12 Wash. St. 61 (40 Pac. Rep. 621); *Eckford v. Berry*, 87 Tex. 415 (28 S. W. Rep. 937); *Harri-man v. Woburn Elec. Light Co.*, 163 Mass. 85 (39 N. E. Rep. 1004). The rule that an absolute deed intended as a mortgage will be so treated applies although the deed contains a covenant by the grantee to pay an existing mortgage on the premises. *Dunton v. McCook*, Ia. (61 N. W. Rep. 977). Where an absolute deed is given as security and the grantee executes a bond for reconveyance upon payment of the debt with a stipulation in the bond, "time being the essence of the contract," does not render the deed absolute upon the failure of the debtor to pay the note at maturity. *Chapman v. Ayer*, 95 Ga. 581 (23 S. E. Rep. 131). A conveyance of land reciting that the consideration therein "shall be refunded" on or before a certain date, it then to "become null and void, otherwise to remain in full force and effect," constitutes a mortgage. *Eckford v. Berry*, 87 Tex. 415 (28 S. W. Rep. 937). Where, after an execution sale of land and before the expiration of the time of redemption, a judgment debtor executes a conveyance of the land sold to the execution purchaser

and they enter into an agreement that the latter is to perfect his title under the sale, the property is to be appraised and enough set off to the purchaser to pay all indebtedness due him and the balance to be conveyed to the judgment debtor's wife, it is held, that the purchaser merely acquires a mortgage interest in the land. *Hibernian Bank. Ass'n. v. Commercial Natl. Bk.*, 157 Ill. 576 (41 N. E. Rep. 919). Under the equity practice of Illinois when a court finds an absolute deed to be a mortgage it should enter an interlocutory order to that effect, and then refer the cause to the master to take an account and ascertain the amount due. *Moffit v. Hanner*, 154 Ill. 649 (39 N. E. Rep. 474). Particular fact cases in which a deed is held to be a mortgage. *Montgomery v. Beecher*, N. J. Eq. (81 Atl. Rep. 451); *Caldwell v. Melvedt*, Ia. (61 N. W. Rep. 1090); *Sanborn v. Sanborn*, Mich. (62 N. W. Rep. 371); *Conlee v. Heying*, Ia. (62 N. W. Rep. 678); *Ferguson v. Bond*, 39 W. Va. 561 (20 S. E. Rep. 591). An absolute deed by a mortgagor to his mortgagee conveying the mortgaged premises in satisfaction of the debt, which deed contained a provision allowing the mortgagor to repurchase the premises within a given date at a fixed price, will not be construed as a mortgage, there being no evidence that the parties thereto intended it as such. *Swarm v. Boggs*, 12 Wash. St. 246 (40 Pac. Rep. 941). Particular fact cases in which a deed is held not to operate as a mortgage. *England v. England*, Ia. (61 N. W. Rep. 920); *Ahern v. McCarthy*, 107 Cal. 382 (40 Pac. Rep. 482).

Sec. 531. Deeds construed as mortgages—Sufficiency of proof. In order to show that a deed absolute on its face is a mortgage, the proof must be clear, satisfactory and conclusive. *England v. England*, Ia. (61 N. W. Rep. 920); *McArthur v. Robinson*, 104 Mich. 540 (62 N. W. Rep. 713); *Story v. Springer*, 155 Ill. 25 (39 N. W. Rep. 570); *May v. May*, 158 Ill. 209 (42 N. E. Rep. 56). Mere loose, indefinite or inconclusive evidence is insufficient. *May v. May*, 158 Ill. 209 (42 N. E. Rep. 56). It must be shown, either by direct evidence or by the circumstances of the case, that it was the intention and understanding of the grantor and

the grantee that it should so operate. It is not enough that one of the parties so considered it. Both must concur; otherwise the deed will be treated according to its import, unless tainted by fraud or the result of accident or mutual mistake. *Reeder v. Gorsuch*, 55 Kan. 558 (40 Pac. Rep. 897). Citing, Beach, Mod. Eq. Jur., § 414; 1 Jones, Mortg., § 835; *Douglas v. Moody*, 80 Ala. 61, 68; *Vincent v. Walker*, 86 Ala. 338, 336 (5 South. Rep. 465); *Holmes v. Fresh*, 9 Mo. 200, 208, 209; *Jones v. Brittan*, 1 Woods 667, 678 (Fed. Cas. No. 7,455); *Andrews v. Hyde*, 8 Cliff. 516 (Fed. Cas. No. 877). Where the evidence is conflicting an absolute conveyance will not be construed a mortgage merely because the consideration paid is less than the value of the property. *Story v. Springer*, 155 Ill. 25 (39 N. E. Rep. 570). The fact that the consideration is grossly inadequate is a strong circumstance, though not conclusive, in support of the claim that the deed was intended to operate as a mortgage. *Caldwell v. Melvedt*, Ia. (61 N. W. Rep. 1090). It must appear that the clause of redemption was omitted by reason of ignorance of the grantor or through mistake, undue influence or fraud. *Sprague v. Bond*, 115 N. C. 580 (20 S. E. Rep. 709). A conveyance for a money consideration and an immediate lease of the premises by the grantee to the grantor is only *prima facie* evidence that the conveyance is in the nature of a mortgage. *Mears v. Strobach*, 12 Wash. St. 61 (40 Pac. Rep. 621). Parol evidence is admissible to show that an absolute deed is, in fact, a mortgage. *McArthur v. Robinson*, 104 Mich. 540 (62 N. W. Rep. 713); *Ahern v. McCarthy*, 107 Cal. 882 (40 Pac. Rep. 482); *Loeb v. McAlister*, Ind. App. (41 N. E. Rep. 1061). Whenever all the circumstances of a transaction show that its object was to secure the repayment of money it will be treated as a mortgage. *Rempt v. Geyer*, N. J. Eq. (82 Atl. Rep. 266).

Sec. 582. Priorities as between mortgagees. A mortgage on land has priority, as to crops growing thereon, over a mortgage subsequently executed on the crops. *Thompson v. Union Warehouse Co.*, Ala. (18 So. Rep. 105). Where several mortgages were executed simultaneously, or as nearly so in point of time as is physically possible, each mort-

gagee knowing at the time of the execution and delivery of the mortgages to others, the mere fact that one of these mortgages was actually filed for record before another did not give the former any priority of lien over the latter. Ga. Acts 1889, p. 106, held not applicable. *Lampkin v. First Nat. Bank*, 96 Ga. 487 (23 S. E. Rep. 390). If the holder of a mortgage take a new mortgage as a substitute for a former one, and cancel and release the latter in ignorance of the existence of an intervening lien upon the mortgaged premises, although such lien be of record, equity will, in the absence of the intervening rights of third parties, restore the lien of the first mortgage and give it its original priority. *Kern v. Hotaling Co.*, 27 Ore. 205 (40 Pac. Rep. 168; 50 Am. St. Rep. 710). Where a note secured by a conveyance in the nature of a mortgage is assigned by the mortgagee who fails to record his assignment, and subsequently the mortgagee reinvests the grantor and maker of the note with the unincumbered title to the property, a mortgage subsequently taken to secure a loan by a third person has priority over the lien claimed by such assignee. *Merrill v. Hurley*, S. Dak. (62 N. W. Rep. 958).

Sec. 533. Priorities as between holders of several notes secured by one mortgage. The several holders of promissory notes secured by the same mortgage, though such notes mature at different times, in the absence of an express agreement to the contrary, are entitled to share *pro rata* the proceedings arising from a sale of the mortgaged premises. Section 5413, Comp. Laws, construed. *Commercial Bank v. Jackson*, S. Dak. (63 N. W. Rep. 548). The court say: "The authorities are not in harmony upon this question, the courts of some states holding that the notes are entitled to a priority in their payment by reason of their earlier maturity, and this is known as the '*pro tanto rule*.' But we are of the opinion that the *pro rata* rule, which distributes the proceeds arising from the sale of the mortgaged premises, when a part of the notes secured by the same mortgage have been transferred and the mortgage assigned, ratably among the holders of the notes, without regard to the time of their maturity, is the better rule, when there is no express contract to the contrary, and is sustained by the greater weight and

number of authorities, of which we shall only cite a few. This seems to be the rule in Michigan, *English v. Carney*, 25 Mich. 178; *McCurdy v. Clark*, 27 Mich. 445; *Jennings v. Moore*, 88 Mich. 281 (21 Am. St. Rep. 601; 47 N. W. Rep. 127); in Minnesota, *Wilson v. Eigenbrodt*, 80 Minn. 4 (18 N. W. Rep. 907); in Pennsylvania, *Donley v. Hays*, 17 Serg. & R. 400; *Fourth Nat. Bank's Appeal*, 128 Pa. St. 478 (10 Am. St. Rep. 538; 16 Atl. Rep. 779); in Nebraska, *Manufacturing Co. v. McCargur*, 20 Neb. 500 (80 N. W. Rep. 686); *Todd v. Cremer*, 86 Neb. 430 (54 N. W. Rep. 674); see Jones, Mortg. (5th Ed.) §§ 822, 1701a, and the full list of cases there cited. In *McCurdy v. Clark*, 27 Mich. 445, Mr. Justice Cooley reviews very fully subdivision 4, § 8498, How. Ann. St. Mich., which seems to be the section from which section 5413 of our Compiled Laws was taken, and he concludes that under that section the *pro rata* rule is the true and proper rule in mortgage foreclosures." The principal case is supported by *State Bank v. Mathews*, 45 Neb. 659 (68 N. W. Rep. 930; 50 Am. St. Rep. 565).

Sec. 534. Purchase money mortgage—Priority. A mortgage taken at the time the mortgagor acquires the legal title to secure the repayment of money furnished to pay the purchase price will be treated as a purchase money mortgage. *Roush v. Miller*, 89 W. Va. 638 (20 S. E. Rep. 663). Where the consideration for a conveyance of land, incumbered beyond its value, is the agreement of the grantee to discharge the liens thereon, a mortgage given by him to secure the payment of money borrowed for that purpose is a purchase money mortgage. *Butler v. Thornburg*, 141 Ind. 152 (40 N. E. Rep. 514). Where the consideration of a deed is the promise of the grantee to pay the grantor a specified annuity during his life, which agreement is expressed in the deed, the deed creates a lien for the performance of such agreement which in its essential nature is similar to a purchase money mortgage. *Doescher v. Doescher*, 61 Minn. 326 (63 N. W. Rep. 736). A mortgage executed by a purchaser to secure the payment of the purchase price or a part thereof, simultaneously with the time of his acquiring title, takes precedence over judgment liens against such purchaser. *Courson v. Walker*, 94 Ga. 175 (21 S. E.

Rep. 287). Such a mortgage has priority over the dower rights of the mortgagor's wife. *Roush v. Miller*, 39 W. Va. 688 (20 S. E. Rep. 663). But in South Carolina it is held that where the mortgagor in such a case conveys part of the land to the mortgagee, in satisfaction of the mortgage, the widow of such mortgagor may assert a right of dower in such land as against a subsequent grantee of the mortgagee. *Jefferies v. Fort*, 48 S. C. 48 (20 S. E. Rep. 755). The case of *Gould v. Wise*, 97 Cal. 532 (32 Pac. Rep. 576; 33 Pac. Rep. 328), epitomized in Ballards' Annual, Volume 8, § 529, p. 628, confirmed and approved. *Gould v. Adams*, 108 Cal. 365 (41 Pac. Rep. 408).

Sec. 535. Assumption of mortgages. The agreement of a grantee assuming a mortgage to pay the debt is an original undertaking on his part, distinct from the contract to purchase, and may be contained in the conveyance, or it may be by separate writing, or rest in parol. In either case, the holder of the incumbrance can take advantage of this promise in a court of equity and obtain a personal judgment for deficiency against the grantee. *Moore v. Booker*, 4 N. Dak. 543 (62 N. W. Rep. 607). Citing, *Wright v. Briggs*, 99 Ind. 563; *Merriman v. Moore*, 90 Pa. St. 78; *Lamb v. Tucker*, 42 Ia. 118; *Winans v. Wilkie*, 41 Mich. 264 (1 N. W. Rep. 1049); *Bolles v. Beach*, 22 N. J. L. 680; *Wilson v. King*, 23 N. J. Eq. 150; *Johnson v. Harder*, 45 Ia. 677; *Ross v. Kennison*, 38 Ia. 396; *Thompson v. Bertram*, 14 Ia. 476; *Vrooman v. Turner*, 69 N. Y. 280 (25 Am. St. Rep. 195); *Douglas v. Wells*, 18 Hun. 88; *Crowell v. Hospital of St. Barnabas*, 27 N. J. Eq. 650; *Conover v. Brown*, 29 N. J. Eq. 510. It is not necessary that there should be a formal promise on the part of the grantee to pay the mortgage debt, in order to render him liable therefor, if his intention to assume the debt appears from a consideration of the entire instrument. The obligation may be made orally or in a separate instrument. It may be implied from the transaction of the parties, or it may be shown by the circumstances under which the purchase was made, as well as by the language used in the agreement. *Hopkins v. Warner*, 109 Cal. 133 (41 Pac. Rep. 868). Citing,

Jones, Mortg., § 748; *Canfield v. Shear*, 49 Mich. 818 (13 N. W. Rep. 605); *Heid v. Vreeland*, 80 N. J. Eq. 591.

A vendee who assumes and agrees to pay an existing mortgage is personally liable to the mortgagee or assigns for the mortgage debt, *Winner v. Lippincott Inv. Co.*, Mo.

(28 S. W. Rep. 898), regardless of whether his grantor was so liable or not. *Hare v. Murphy*, 45 Neb. 781 (64 N. W. Rep. 211; 29 L. R. A. 851). Citing, *Merriam v. Moore*, 90 Pa. St. 78; *Dean v. Walker*, 107 Ill. 540; *Bay v. Williams*, 112 Ill. 91 (1 N. E. Rep. 840). A deficiency judgment may be had against such a vendee, *Tulare Co. Bank v. Madden*, 109 Cal. 812 (41 Pac. Rep. 1092); and a mortgagor paying the debt may recover from him, *Williams v. Moody*, 95 Ga. 8 (22 S. E. Rep. 80). The covenant of assumption is conclusive as to the validity of the mortgage, *Alvord v. Spring Valley Gold Co.*, 106 Cal. 547 (40 Pac. Rep. 27); and in the absence of fraud he cannot avoid it by showing that the written contract under which he purchased the land provided that it should be conveyed "subject to the indebtedness thereon." *Weaver v. McKay*, 108 Cal. 546 (41 Pac. Rep. 450). A grantee in a deed cannot be bound by a clause assuming a mortgage inserted in the deed by his agent authorized only to accept the deed. *Metzer v. Huntington*, 139 Ind. 501 (39 N. E. Rep. 235). Where one purchased mortgaged property and caused the same to be conveyed to another without his knowledge or consent such conveyance providing that the grantee "assumed and agreed to pay the mortgage," and such grantee, upon acquiring knowledge of the existence of this covenant, refused to accept and hold the title unless released therefrom by the grantor, which was subsequently done, it was held that the mortgagee had no right of action against such grantee on account of such covenant. *Gold v. Ogden*, 61 Minn. 88 (63 N. W. Rep. 266). A grantee assuming and agreeing to pay an existing mortgage is bound by the terms of the debt given in the mortgage or as given in the instrument to which the mortgage refers. *Williams v. Moody*, 95 Ga. 8 (22 S. E. Rep. 80). One who buys property affected by a recorded mortgage containing the clause *de non alienande*, which mortgage he assumes and agrees to pay, is legally bound and held to know that the holder of the mort-

gage claim is entitled under that clause, in case of default of payment, to enforce his rights as if the original owner still held the property, and to know that in so doing no notice need be given him. *Truxillo v. Delaune*, 47 La. 10 (16 So. Rep. 642).

A grantee of mortgaged lands does not become personally liable for the debt by purchasing subject thereto, nor by the retention of the amount of the mortgage out of the purchase price, but to create such liability there must be an agreement on his part to pay or assume the payment of the debt. *Granger v. Roll*, S. Dak. (62 N. W. Rep. 970). Citing, *Fiske v. Tolman*, 124 Mass. 254; (26 Am. St. Rep. 659); *Fowler v. Fay*, 62 Ill. 375; *Hubbard v. Ensign*, 46 Conn. 576; *Johnson v. Monell*, 13 Ia. 300; *Gage v. Jenkinson*, 58 Mich. 169 (24 N. W. Rep. 815); *Mason v. Barnard*, 36 Mo. 384; *Schley v. Fryer*, 100 N. Y. 71 (2 N. E. Rep. 280); *Johnson v. Zink*, 51 N. Y. 333. To the same effect is the following case. *Green v. Hall*, 45 Neb. 89 (63 N. W. Rep. 119). A vendee who takes a conveyance "under and subject to the payment of" a certain mortgage thereby impliedly covenants to pay such mortgage as a part of the purchase money. *Blood v. Crew Levick Co.*, 171 Pa. 328 (33 Atl. Rep. 344). Where a vendee assumes the payment of a mortgage in a land contract, which provides for its forfeiture upon failure to make the payments therein provided for, unless there has been an actual acceptance of the assumption by the mortgagee, such contract may be forfeited by the vendor to make the payments as provided. *Miller v. Hughes*, Ia. (63 N. W. Rep. 680). Where G. is the owner of nine lots, and conveys seven of them to P., who assumes and agrees to pay a mortgage upon the nine lots, and afterward conveys the remaining two lots to F. by deed of general warranty, and such conveyance to F. is made during the pendency of a foreclosure of the mortgage assumed by P., the covenant to pay such incumbrance becomes a chose of action upon which F. cannot maintain a cause of action. *Pearson v. Ford*, 1 Kan. App. 580 (42 Pac. Rep. 257). A mortgagor's grantee and his tenant hold subject to the mortgage. *Cullen v. Foote*, 60 Minn. 6 (61 N. W. Rep. 818). A provision in a deed as fol-

lows. "It is hereby agreed between the parties to this instrument that the said party of the second part accepts the title to the foregoing and described pieces and parcels of land and oil rights subject to the payment of the mortgages herein above mentioned, but does not assume the payment of the various outstanding notes given for the debts secured by said mortgages," is held to be a covenant to pay to the mortgagees the amount due upon the mortgages referred to, but does not impose upon the purchaser the duty of hunting up the notes and paying the same to the holder. *Blood v. Crew Levick Co.*, 171 Pa. 328 (83 Atl. Rep. 344). Where a covenant of assumption is invalid as between the parties to the deed the mortgagee can derive no advantage from it. *Green v. Stone*, N. J. Eq. (82 Atl. Rep. 706).

Sec. 536. Assumption of mortgage—Surety relation of mortgagor. Where a mortgagor's grantee assumes and agrees to pay an existing mortgage the grantee becomes the principal debtor and the mortgagor occupies the position of his surety, and a personal judgment for any deficiency may be returned against both of them. Cal. Civ. Code, § 2854, applied. *Hopkins v. Warner*, 109 Cal. 133 (41 Pac. Rep. 868). Upon this subject, in the recent case of *Fish v. Glover*, 154 Ill. 86 (39 N. E. Rep. 1081), the supreme court of Illinois say: "It has been held that, as between the mortgagor and the grantee of the mortgaged property, who assumes the mortgage debt, the latter becomes the principal debtor, and the former the surety for the payment of the debt. *Flagg v. Geltmacher*, 98 Ill. 298; *Dean v. Walker*, 197 Ill. 540 (47 Am. St. Rep. 467); *Ellis v. Johnson*, 96 Ind. 337; *George v. Andrews*, 60 Md. 26 (45 Am. St. Rep. 706). But this is only true as between the grantee of the mortgagor assuming the mortgage debt and the mortgagor himself. As between them, the mortgaged property becomes the primary fund. But the mortgagee may treat both as principal debtors, and may have a personal decree against both, unless he has consented to accept such grantee of the mortgagor as the principal debtor and to hold the mortgagor as surety merely. The mortgagee, in the absence of such assent, is not bound by the relation of suretyship existing between the mort-

gagor and the grantee who assumes the payment of the mortgage. The rights of the mortgagee remain unchanged, and his relation to the mortgagor is not affected, so that, against him, the mortgagor is in no position to assert and take advantage of the right of a surety. The doctrine is stated by Mr. Jones in his work on mortgages (at section 741) in the following words: 'The mere assignment by the mortgagor of his interest in the mortgaged premises to a third person, who agrees to pay off the mortgage, does not release the mortgagor. There is no novation unless there be something to show that the mortgagee has released the mortgagor, and has agreed to look solely to the purchaser for payment of the mortgage debt. There must be a substitution of a new obligation for the old one, and the new obligation must be a valid one.' *Shepherd v. May*, 115 U. S. 505 (6 Sup. Ct. 119); *Hayward v. Burke*, 151 Ill. 121 (37 N. E. Rep. 846); *Corbett v. Waterman*, 11 Iowa 86; *James v. Day*, 37 Iowa 164; *Massie v. Mann*, 17 Iowa 132; *Thompson v. Betram*, 14 Iowa 476; *Waters v. Hubbard*, 44 Conn. 340; *Marsh v. Pike*, 1 Sandf. Ch. 210. The mortgagee is entitled to the obligation of the purchaser, but it is treated as a collateral obligation. It would be a singular doctrine, if the contract rights of the mortgagee could be changed by any agreement between the mortgagor and his grantee to which the mortgagee was not a party. Jones, Mortg., § 742 a." A statute (Ill. Rev. Stat. 1893, Ch. 132, § 1) which provides that "when any person bound as surety for another for the payment of money, or the performance of any other contract in writing apprehends that his principal is likely to become insolvent," he may require the creditor either to sue the principal debtor or release the surety, does not apply to an implied relation of suretyship existing between mortgagor and his grantee who has assumed the payment of the debt. *Fish v. Glover*, 154 Ill. 86 (39 N. E. Rep. 1081). An extension of time given by the mortgagee to the grantee without the consent of the mortgagor operates to release him to the extent of the value of the land. *Travers v. Dorr*, 60 Minn. 173 (62 N. W. Rep. 269). A mortgagor who conveys the premises to another who assumes and agrees to pay the debt is not released from his personal liability by the mortgagee's consenting to a sale of a part of the property, which he releases from

the mortgage, where the proceeds of such sale are to be applied to the payment of the debt. *Norton v. Henry*, 67 Vt. 380 (81 Atl. Rep. 787). A vendor, for whose benefit a covenant of assumption and payment is made, cannot maintain an action against the vendee until he has suffered loss on account of the latter's failure to perform his agreement. *Blood v. Crew Levick Co.*, 171 Pa. 389 (88 Atl. Rep. 348).

Sec. 537. Assignment of mortgages. A mortgage may be assigned by parol when accompanied with the necessary delivery. *Hill v. Alexander*, 2 Kan. App. 251 (41 Pac. Rep. 1066). The assignment of an obligation secured by a mortgage carries with it the benefit of such security as an incident of the assignment. *Thomas v. Linn*, 40 W. Va. 122 (20 S. E. Rep. 878); *Kernohan v. Manss*, 53 O. St. 118 (41 N. E. Rep. 258); but the assignment of a note given by a mortgagor in part payment of the mortgage debt does not carry with it a *pro tanto* of the mortgage. *Fitch v. Iron Nat. Bank*, 145 N. Y. 498 (40 N. E. Rep. 205). An assignment of a mortgage by an administrator to himself as an individual is not void, but merely voidable at the election of the next of kin of the deceased. *Read v. Knell*, 143 N. Y. 484 (39 N. E. Rep. 4). Under Ga. Code, §§ 1966, 2244, it is held that although the transfer of a note secured by a mortgage passes to the assignee the equitable title to the mortgage, it does not pass the legal title of the same to the assignee, but a written instrument is necessary to accomplish this purpose. *Foster v. McGuire*, 96 Ga. 447 (28 S. E. Rep. 398). Where the owner of a note secured by a mortgage duly assigns such note to another he cannot subsequently make a valid assignment of the mortgage to a third party. *Alder v. Newell*, 109 Cal. 42 (41 Pac. Rep. 799). A mortgage executed to a trustee, "his assigns and successors," may be assigned by him. *Giselman v. Starr*, 106 Cal. 651 (40 Pac. Rep. 8). Where the holder of a note secured by a mortgage assigns the same and executes to his assignee a mortgage upon the mortgaged premises to secure its payment, such mortgage will be treated as an assignment of the mortgage held by him. *State Bank v. Mathews*, 45 Neb. 659 (63 N. W. Rep. 930; 50 Am. St. Rep. 565). It is held under Md. Code (See Ballards' Annual, Vol.

2, § 899), that a married woman cannot make a valid assignment of a mortgage executed to her without her husband joining. *Griffin v. Blandin*, 80 Md. 180 (80 Atl. Rep. 624). A mere promise by the mortgagee to assign a mortgage in consideration of the payment of part of the debt secured thereby is not enforceable for the reason that it is without consideration. *Isham v. Therasson*, 58 N. J. Eq. 10 (80 Atl. Rep. 969).

Sec. 538. Recording assignment of mortgage—Payment to mortgagee after assignment. The assignment of a mortgage is not a "grant of an estate in real property," within the meaning of Cal. Civ. Code, § 1107, which makes such grants conclusive against the grantor except as against one acquiring title in good faith "by an instrument that is first duly recorded." *Adler v. Newell*, 109 Cal. 42 (41 Pac. Rep. 799). Under S. Dak. compiled Laws, §§ 4360, 3293, 3294, an assignment of a mortgage should be recorded and where a real estate mortgage, given to secure a non-negotiable note, is assigned to a purchaser of the same, who fails to put such assignment on record, and the mortgagee, notwithstanding such assignment, forecloses such mortgage, sells the mortgaged premises, and the subsequent grantee of the mortgagor redeems the same within the statutory time, without notice or knowledge of such assignment, but in good faith relying upon the record and the right of the mortgagee to so foreclose, such grantee and redemptioner takes the title to the mortgaged premises free from the lien of such mortgage. *Merrill v. Luce*, S. Dak. (61 N. W. Rep. 48). The rights of an assignee of a mortgage who fails to have his assignments recorded are inferior to those of a subsequent innocent purchaser from the mortgagor who takes his title relying upon a recorded satisfaction of the mortgage made by the original mortgagee after such assignment. *Merrill v. Hurley*, S. Dak. (62 N. W. Rep. 958). *Pickford v. Peebles*, S. Dak. (68 N. W. Rep. 779). In Washington there is no statute providing for the recording of an assignment of a mortgage. *Howard v. Shaw*, 10 Wash. St. 151 (38 Pac. Rep. 746).

Payment of the debt by the mortgagor to the mortgagee after an assignment of the mortgage of which the mortgagor

has no notice satisfies the mortgage. *Commercial Bank v. King*, 107 Ala. 484 (18 So. Rep. 243). Where mortgage debtors, with knowledge that their mortgage has been assigned to another, which assignment has not been recorded, make a payment to the original mortgagee and secure a release from him of part of the mortgaged premises which release is recorded, and they subsequently mortgage such premises to another, the rights of the latter mortgagee are superior to those of the holder of the unrecorded assignment. *Frank v. Snow*, Wyo. (42 Pac. Rep. 484). Neb. Rev. Stat. 1898, Ch. 78, § 89, providing that "the recording of an assignment of a mortgage shall not in itself be deemed notice of such assignment to the mortgagor, his heirs or personal representatives, so as to invalidate any payment made by them, or either of them, to the mortgagee" is to be strictly construed and does not apply to a purchaser from the mortgagor, nor to mortgages securing negotiable notes. *Eggert v. Beyer*, 43 Neb. 711 (62 N. W. Rep. 57); *Stark v. Olsen*, 44 Neb. 646 (63 N. W. Rep. 37). Citing, *Williams v. Keyes*, 90 Mich. 290 (51 N. W. Rep. 520; 30 Am. St. Rep. 438). The first case cited contains an extensive discussion concerning the construction of this statute.

Sec. 539. Payment, release and satisfaction. Where the note secured by a mortgage cannot be produced or accounted for, it will be presumed to have been paid. *Ward v. Munson*, Mich. (63 N. W. Rep. 498). The holder of a mortgage who retains possession of the mortgage papers does not, by empowering one to collect the interest as his agent, authorize a payment of the principal to him, and the mortgagor is not released by such a payment where such agent fails to turn the same over to his principal. *Joy v. Vance*, 104 Mich. 97 (62 N. W. Rep. 140); *Bromley v. Lathrop*, Mich. (63 N. W. Rep. 510); *Trowbridge v. Ross*, Mich. (63 N. W. Rep. 534). Payment by a mortgagor to the mortgagee after he has assigned his mortgage to another, without the production of the mortgage or note, does not release such mortgagor from his obligation to pay to the assignee if the mortgagee fails to turn the payment over to him. *Baumgartner v. Peterson*, Ia. (62 N. W. Rep.

27); *Eggert v. Beyer*, 43 Neb. 711 (62 N. W. Rep. 57). Where a mortgagor gives a note as a conditional part payment of his debt, which note is assigned by the mortgagee it operates as such part payment while in the hands of such assignee, but the assignment does not carry with it a *pro tanto* assignment of the mortgage. *Fitch v. Iron Nat. Bank*, 145 N. Y. 498 (40 N. E. Rep. 205). In order for the execution of another note to the mortgagee to operate as payment it must be shown that the parties agreed and understood that it was to have that effect. *Savings & Loan Soc. v. Burnett*, 103 Cal. 514 (39 Pac. Rep. 922). It is held by a divided court that a tender of the amount due by a mortgagor, after maturity, without payment into court, does not discharge the mortgage lien, but only stops interest and costs. *Parker v. Beasley*, 116 N. C. 1 (21 S. E. Rep. 955). One relying upon a release made by an agent must ascertain his authority to make the same. *Rice v. Winters*, 45 Neb. 517 (63 N. W. Rep. 830). A mortgagee who consents to the sale of timber on the mortgaged premises and receives the proceeds therefor to apply on his claim thereby releases the timber from the lien of his mortgage. *Fredonia Nat. Bank v. Borden*, 166 Pa. St. 177 (30 Atl. Rep. 975). A purchaser of timber from the owner of mortgaged premises does not acquire any equitable right to have the same released from the lien of the mortgage on account of the fact that he paid the purchase price to such owner who subsequently applied the money to the development of mining interests on the land, the proceeds of which were applied directly to the payment of the mortgage under an arrangement between him and the mortgagee. *Fredonia Nat. Bank v. Collins*, 172 Pa. 15 (33 Atl. Rep. 351). Although an action upon a mortgage debt of a deceased mortgagor is barred by the statute of limitations his administrator is not entitled to a decree directing the satisfaction of the mortgage without making payment of the debt. *Boyce v. Fisk*, 110 Cal. 107 (42 Pac. Rep. 473). An action to enforce satisfaction of a mortgage on the ground of tender of amount due and refusal to accept will not lie where it appears that the tender was made before the debt was due. *Bowen v. Julius*, 141 Ind. 310 (40 N. E. Rep. 700). Where the owner of a homestead having executed upon it a valid and enforceable

mortgage, in order to procure an extension of time, causes the holder thereof to satisfy such mortgage and executes to him in its stead new notes and a new mortgage which mortgage is void because not signed by the mortgagor's wife, equity will not enforce the void mortgage but will treat the first mortgage as in force just as if no satisfaction of it had been made. *Van Sandt v. Alvis*, 109 Cal. 165 (41 Pac. Rep. 1014). Where a statute (N. J. Rev., p. 707, §§ 25, 26) requires an officer to enter satisfaction of the mortgage "whenever there shall be presented to him a certificate signed by the mortgagee, his heirs, executors, administrators or assigns," he is not bound to search the records for an assignment of the mortgage, before recording a certificate tendered to him duly executed by the executors of the mortgagee. *State to use of Ashby v. Parker*, 57 N. J. L. 677 (82 Atl. Rep. 260). Particular fact cases in which a satisfaction of a mortgage executed by an aged father to his son was set aside on account of mental incapacity of the father. *Henrizi v. Kehr*, 90 Wis. 344 (63 N. W. Rep. 285). For construction of a particular stipulation in a mortgage of several lots providing for a release of part of them in case of their sale or the making of partial payments, see, *Commercial Bank v. Hiller*, Mich. (63 N. W. Rep. 1012).

Sec. 540. Penalty for failure to enter satisfaction—
Statutes construed. It is no defense to an action under Ala. Code, § 1869, to recover the penalty from the mortgagee for his failure to enter satisfaction, to allege that the mortgagee was physically unable to enter such satisfaction, it not appearing that he was incapacitated from transacting business. *Walker v. English*, 106 Ala. 369 (17 So. Rep. 715). Ala. Code, § 1868, applied—action for penalty for failure of mortgagee to enter payments on the margin of the records. *Loeb v. Huddleston*, 105 Ala. 257 (16 So. Rep. 714). Cal. Civ. Code, § 2941, construed—action for penalty for failure to satisfy mortgage—jurisdiction. *Randolph v. Kraemer*, 106 Cal. 199 (39 Pac. Rep. 533). Kan. Laws 1889, Ch. 175, providing for the recovery of a penalty for failure to discharge a mortgage upon demand, is to be strictly construed; and in order for there to be a recovery under the statute there must be proof of a demand in accordance therewith or the showing of

such facts as excuse a demand. *Shults v. Morgan*, 1 Kan. App. 572 (42 Pac. Rep. 254). In construing S. Dak. Comp. Laws, § 4865, which requires a mortgagee or his assignee, upon payment of the mortgage, to enter satisfaction thereof on the record, or upon the demand of the mortgagor, execute to him a certificate of discharge of said mortgage, and makes him liable in damages, and enforces a penalty upon him for his failure to do so, it is held that such statute may be enforced by the mortgagor, his grantee or heirs; that a complaint thereunder is sufficient if made in the language of the statute; that a certificate of discharge tendered by the mortgagor for execution is sufficient although the blanks in the acknowledgment are not filled; that the mortgagee is not relieved from the operation of the statute by an assignment of his mortgage until such assignment has been duly recorded; that the penal provisions of the statute cannot be enforced against a mortgagee by a demand upon him, and his refusal, made in another state, but in such case he may be liable for any damages the mortgagor, his grantee or heirs, may sustain by reason of such neglect or refusal to so discharge the same. *Jones v. Fidelity Loan & T. Co.*, S. Dak. (68 N. W. Rep. 558).

Sec. 541. Foreclosure of mortgages — General principles. Foreclosure will not be enjoined to await an accounting where it is apparent that the object is merely delay. *Barber v. Levy*, Miss. (18 So. Rep. 438). Upon foreclosure of a purchase money mortgage which is adjudged void a vendor's lien may be decreed. *Mutual Building & L. Ass'n v. Wyeth*, 105 Ala. 639 (17 So. Rep. 45). In Illinois it is held that where an attempted foreclosure of a purchase money mortgage failed because it appeared that the mortgage was never delivered, the plaintiff was not entitled to a decree enforcing a vendor's lien. *Baker v. Updike*, 155 Ill. 54 (39 N. E. Rep. 587). In construing S. C. Code Civ. Proc., § 144, and Rev. Stat., § 2247, it is held that actions of foreclosure must be brought in the county in which the land is situated. *Kaminsky v. Trantham*, S. C. (22 S. E. Rep. 746). The passing of title by foreclosure proceedings is an alienation within the provisions of the statute of 8 and 4 W. and M. Ch. 14. *Stewart v. Blalock*, S. C. (22 S. E. Rep. 774).

An agreement by a mortgagee to waive his right to foreclose on account of non-payment of interest in consideration of the mortgagor doing something which he is already bound to do, cannot be enforced. *Baldwin Inv. Co. v. Bailey*, 45 Neb. 580 (68 N. W. Rep. 847). Where a mortgagor's equity of redemption is barred by a foreclosure the rights of his assignee of such equity are extinguished. *Snyder v. Chicago, S. F. & C. Ry. Co.*, 181 Mo. 568 (88 S. W. Rep. 67). Where, upon foreclosure of a mortgage by a building and loan association, the proceeds are sufficient to pay the entire debt, the mortgagor is entitled to a return of stock in such association assigned to it as additional security, although the mortgage provided that such stock should be forfeited to the association in case of default. *Rowland v. Old Dominion Bldg. & L. Ass'n*, 116 N. C. 877 (22 S. E. Rep. 8). Where the owner of land gives a second mortgage thereon and by agreement his second mortgagee withholds from the amount of his loan a sufficient sum to discharge the first mortgage, it is held that his failure to discharge such first mortgage does not relieve the original mortgagor from liability on his first mortgage, and upon default in payment of both mortgages, the first mortgagee may foreclose his mortgage for the amount of his debt and the second for the amount actually paid to the mortgagor. *Moore v. Kline*, 48 Neb. 517 (61 N. W. Rep. 786). Where by the terms of a mortgage a mortgagee has an optional right to foreclose upon the mortgagor's default for thirty days in payment of interest or taxes, a right to foreclose accrues when the default occurs and cannot be barred by a subsequent tender of payment by the mortgagor, nor is he entitled to notice from the mortgagee of his intention to avail himself of his right to foreclose, but the bringing of the suit is a sufficient election and notice. *Swearingen v. Lahner*, Ia. (61 N. W. Rep. 431; 26 L. R. A. 765).

Sec. 542. Strict foreclosure. Where a complainant who purchased at foreclosure sale a portion of the mortgaged premises files a bill for strict foreclosure, against a defendant who purchased the same portion of the mortgaged premises from an owner of the whole premises, who was not made party to the foreclosure suit, and whose rights were not fore-

closed, it is not necessary that the persons interested in the remaining lands, either as succeeding to the original mortgagor or mortgagee should be made parties. In such bill of strict foreclosure, if it appears by the bill that the remaining lands are still owned by the defendant's grantor, or were not conveyed by her previous to the conveyance to defendant, the defendant would appear to be entitled to have the remaining lands first sold to satisfy the mortgage; and the bill must allege that the mortgage was not paid by the sale of the remaining lands, and that the value of these lands is not sufficient to pay the mortgage debt. Demurrer sustained for want of such allegation. On such bill for strict foreclosure, the court will determine, upon the proofs, the amount of the mortgage properly chargeable against the portion owned by defendant. *Pettin-gill v. Hubbell*, 53 N. J. Eq. 584 (32 Atl. Rep. 76).

Sec. 543. Foreclosure by suit—Practice. Where co-defendants with the mortgagor file a cross petition against him after he has answered the plaintiff's complaint they must serve him with notice of such petition. *Havemeyer v. Paul*, 45 Neb. 373 (63 N. W. Rep. 932). Under Cal. Code Civ. Proc., §§ 1475, 1500, a mortgage upon community property may be foreclosed against the surviving husband or wife without presenting it as a claim against the estate of the one deceased. *McGahey v. Forrest*, 109 Cal. 63 (41 Pac. Rep. 817). For further application of this statute, see *Hibernia Sav. & L. Soc. v. Thornton*, 109 Cal. 427 (42 Pac. Rep. 447; 50 Am. St. Rep. 52). "A decree will not be made on the foreclosure of a mortgage without producing the securities, unless their absence is accounted for by clear and conclusive proof." *Ward v. Munson*, Mich. (63 N. W. Rep. 498). Citing, *George v. Ludlow*, 66 Mich. 176 (33 N. W. Rep. 169); *Bergen v. Urbahn*, 83 N. Y. 49; *Buckmaster v. Kelly*, 15 Fla. 180; *Butler v. Washington*, 28 S. C. 607 (5 S. E. Rep. 601); *Field v. Anderson*, 55 Ark. 546 (18 S. W. Rep. 1038). The original decree may be amended or modified provided the essential parts thereof are not changed. *Farmers' L. & T. Co. v. Oregon Pac. R. Co.*, 28 Ore. 44 (40 Pac. Rep. 1089). Where the motion of the defendant to have the description of the property given in the complaint amended is overruled such

description cannot be subsequently amended by the court to the injury of such defendant. *Keys v. Lardner*, 55 Kan. 831 (40 Pac. Rep. 644). In an action by a building and loan association against one of its members to foreclose a mortgage, an assessment due against his stock can not be recovered unless such recovery is asked for in the complaint. *Cummings v. Citizens' B. L. & S. Ass'n*, 142 Ind. 600 (42 N. E. Rep. 213). Where the payment of the interest on a note is guaranteed by a third person the mortgagee is entitled, upon foreclosure, to have the proceeds of the land applied first to the payment of the principal. *Smythe v. New England L. & T. Co.*, 12 Wash. St. 424 (41 Pac. Rep. 184). Where a mortgage upon land and crops growing thereon is inferior to another mortgage as to the crops, the court should direct a separate sale of the crops and the application of the proceeds thereof to the payment of the mortgage having priority thereon. *Simson v. Ferguson*, 112 Cal. 180 (40 Pac. Rep. 104). Under Neb. Code Civ. Proc., §§ 847-851, an action on the debt and an action to foreclose cannot be maintained separately at the same time, and where the creditor commences one of these proceedings he must exhaust his remedy thereunder before resorting to the other. *Meehan v. First National Bank*, 44 Neb. 218 (62 N. W. Rep. 490); *Hargraves v. Menken*, 45 Neb. 668 (68 N. W. Rep. 951). The executor of a deceased mortgagee may join with his testator's joint mortgagee in the foreclosure of the mortgage. Minn. Gen. Stat. 1894, §§ 4502, 4503, applied. *Eliason v. Sidel*, 61 Minn. 285 (63 N. W. Rep. 730). A provision in the decree directing the officer to make title to him "on payment of the costs and disbursements," in case the plaintiff becomes the purchaser, is proper. *Marshall v. Creel*, S. C. (22 S. E. Rep. 597). Ala. Code, § 2720; Acts, 1892-93, p. 1127, applied—jury trial to determine amount of debt due. *Powell v. Crawford*, Ala. (18 So. Rep. 302). Cal. Code Civ. Proc., § 726, construed and applied—appointment of commissioners to make sale. *MacDermot v. Barton*, 106 Cal. 194 (39 Pac. Rep. 588). Mo. Gen. Stat. 1865, p. 270, § 69 applied—foreclosure of a school fund mortgage. *Snyder v. Chicago S. F. & C. Ry. Co.*, 181 Mo. 568 (38 S. W. Rep. 67). Neb. Code Civ. Proc.,

§ 149, applied—filing of supplemental petition. *Havemeyer v. Paul*, 45 Neb. 373 (63 N. W. Rep. 932).

Sec. 544. Complaint in foreclosure proceedings. A complaint to foreclose brought by the heirs of a deceased mortgagee which fails to allege that the estate has no debts and that there has been no administration is fatally defective. *Brunson v. Henry*, 140 Ind. 455 (39 N. E. Rep. 256). A complaint may refer to a copy of the mortgage attached to and made a part of it, for a description of the premises. *Krathwohl v. Dawson*, 140 Ind. 1 (39 N. E. Rep. 496).

Sec. 545. Parties to foreclosure proceedings. The administrator of a mortgagor is a proper party, and those claiming under him are bound by a decree to which he is a party. *Hunter v. Shelby Iron Co.*, Ala. (18 So. Rep. 106). Under Ky. Civ. Code, § 694, subd. 3, all lien-holders should be made parties. *Commonwealth v. Robinson*, 96 Ky. 553 (29 S. W. Rep. 306). Under the statute of Florida it is held that in a suit to foreclose brought against a deceased mortgagor, his heirs are not necessary parties, but it is not improper to make them parties, and where they have been made parties and the bill dismissed as to them they may appeal from the final decree. *Ballard v. Kennedy*, 84 Fla. 483 (16 So. Rep. 327). Where a mortgage contains the clause *de non aliendo* it may be foreclosed against the mortgaged property without making a subsequent purchaser of the mortgaged property a party defendant. *Fleitas v. Meraux*, 47 La. 232 (16 So. Rep. 848); *Truxille v. Delaune*, 47 La. 10 (16 So. Rep. 642). In an action to foreclose a mortgage upon partnership property the wives of the mortgagors are not necessary parties. *Harrington v. Johnston*, 10 Wash. St. 542 (39 Pac. Rep. 141). The court say: "In most, if not all, of the states, it is the settled doctrine that the property of the partnership, including its real estate, is in equity a fund for the payment of the indebtedness of the partnership, and the adjustment of its affairs between the partners, and that the right of the partnership to use all its property for that purpose is in no manner affected by any contingent rights which the wives of the respective partners may have in the property after the settlement of the partnership affairs. *Shanks v. Klien*, 104 U.

S. 18; *Bopp v. Fox*, 63 Ill. 540; *Logan v. Greenlaw*, 25 Fed 299; *Lenow v. Fones*, 48 Ark. 557 (4 S. W. Rep. 56); *Mallory v. Russell*, 71 Iowa 68 (82 N. W. Rep. 102; 60 Am. Rep. 776); *Lindl. Partn.* (Ewell's 2d Ed.), p. 755, note." Under a statute (Neb. Code Civ. Proc., § 849) which provides that "if the mortgage debt be secured by the obligation or other evidence of debt of any other person besides the mortgagor, such person may be made a party to the petition and a deficiency judgment obtained against such person as well as the mortgagor," it is held that a mortgagee who assigns the debt and thereby becomes an endorser is a proper party defendant. *Meehan v. First Nat. Bank*, 44 Neb. 218 (62 N. W. Rep. 490). Citing, *Farman v. Wiswall*, 24 N. J. Eq. 267.

Sec. 546. Defenses to foreclosure proceedings. An answer denying "that there is anything due on the note and mortgage," tenders no issue. *Baldwin v. Burt*, 43 Neb. 245 (61 N. W. Rep. 601). An answer which does not deny the debt but alleges that the mortgaged land is part of an undivided decedent's estate in which several persons have undetermined interests will not bar foreclosure, but it may influence the court to suspend the enforcement of the judgment until the undetermined interests can be settled. *Wall v. McMillan*, 44 S. C. 402 (22 S. E. Rep. 424). Foreclosure against a deceased mortgagor cannot be defeated by showing that the notes secured by the mortgage have been allowed as a claim against his estate. *Kohli v. Hall*, 141 Ind. 411 (40 N. E. Rep. 1060). The defendant in an action by the assignee to recover money due to an insolvent banking corporation may set off against the amount owing by him to the bank an indebtedness of the latter to him. *Salladin v. Mitchell*, 42 Neb. 859 (61 N. W. Rep. 127). A defense against a mortgage on account of it having been executed by a married woman to secure the individual debt of her husband must be specially pleaded. *Chadron Banking Co. v. Mahoney*, 43 Neb. 214 (61 N. W. Rep. 594). Under Wis. Rev. Stat., § 8103, providing that one having a lien upon an undivided interest in land sought to be partitioned is a proper, although not a necessary party, and, "if partition is made, such lien upon an undivided interest or estate shall thereafter be a charge only

on the share assigned to the party against whom it exists, which share shall be charged with its just proportion of the costs in preference to such lien, but in no other case shall such partition alter, affect, or impair the lien of any such creditor," it is held that the pendency of a partition suit by a purchaser of a part of the common estate is no bar to an action to foreclose a mortgage executed by one of the common owners, although such mortgagee is a party to the partition suit. *Gibson v. S. W. L. Co.*, 89 Wis. 49 (61 N. W. Rep. 282). A discharge of an assignor in insolvency under S. & B. Wis. Stat., §§ 1702q, 1702r, is a bar to the personal recovery against him of the mortgage debt previously proved against his estate, but is no bar to the foreclosure of the mortgage. *Trustees Wis. St. Grange O. P. of H. v. Kniffen*, 90 Wis. 14 (62 N. W. Rep. 948). The execution of a trust deed being admitted, it is no defense to an action by the grantee to foreclose it to show that its probate for registration was void. *McGurie v. Gallagher*, 95 Tenn. 849 (82 S. W. Rep. 209). In an action to foreclose a mortgage given by an executrix under a power to sell or mortgage only for "the benefit of my said estate," the defendant may show that it was given in violation of the power, and if he fail to do this that question is adjudicated against him. *Roarty v. McDermott*, 146 N. Y. 296 (41 N. E. Rep. 80). A mortgagor can not defend against an action to foreclose on the ground that the plaintiff acquired his title to the mortgage by an assignment thereof made to himself individually, through a third person, while he was acting as the administrator of the deceased mortgagee. *Read v. Knell*, 143 N. Y. 484 (39 N. E. Rep. 4). In New York it is held that, in a foreclosure suit, the validity of a tax title, claimed as paramount to plaintiff's rights under the mortgage, cannot be adjudicated against a defendant's objections. *Oliphant v. Burns*, 146 N. Y. 218 (40 N. E. Rep. 980). It is no defense to the foreclosure of a purchase money mortgage that there is an outstanding incumbrance against which the mortgagee has covenanted in his deed of conveyance. *Bay View Land Co. v. Myers*, 62 Minn. 265 (64 N. W. Rep. 816).

Sec. 547. Usury as a defense to foreclosure—Building and loan association mortgages. Usury is no defense

to an action at law on a mortgage securing the usurious debt if any part of the debt remains unpaid. *Powell v. Crawford*, Ala. (18 So. Rep. 802). Although a mortgage loan is made payable in another state the usury law in the state in which the land is situated will govern in the enforcement of the mortgage. *Meroney v. Atlanta Nat. Bldg. & L. Ass'n*, 116 N. C. 882 (21 S. E. Rep. 924; 41 Am. St. Rep. 841). The defense of usury and counterclaim for usurious interest does not create an issue "of fact in an action for the recovery of money only," within the meaning of Code Civ. Proc., § 274, providing that such an issue must be tried by a jury. *McLaurin v. Hodges*, 43 S. C. 147 (20 S. E. Rep. 991). A mortgage given to a building and loan association cannot be defended against as usurious because the profits realized from the loan exceed the legal rate of interest. *Hawkins v. Americus Nat. Bldg. & L. Ass'n*, 96 Ga. 206 (22 S. E. Rep. 711). The court say: "The scheme itself for the conducting of building and loan associations is not *per se* usurious, and, if the transaction was designed to carry into effect the scheme and purposes for which the association was chartered, it was not unlawful. We do not mean to intimate that the principal of mutuality alone in the conduct of its business would protect all the dealings of a building and loan association against impeachment for usury. The principle itself may be made a cloak to conceal usury. We only mean to hold that, if there be not beneath the scheme for the conduct of mutual building and loan associations a covert wherein usury doth secretly lurk, their transactions may be upheld."

Sec. 548. Statute of limitations. The remedy for the debt may become barred although the lien of the mortgage continues to subsist. *Princeton Sav. Bank v. Martin*, 53 N. J. Eq. 463 (33 Atl. Rep. 45). An admission or promise that will suspend the operation of the statute as to the debt will keep alive the lien of the mortgage given to secure it. *First Nat. Bank v. Woodman*, Ia. (62 N. W. Rep. 28). Where a life tenant conveyed the estate in fee and gave to his grantee an indemnity mortgage on other land, which mortgage was to be null and void if the remaindermen should execute a conveyance of their several interests as they became of

age, it was held that the statute of limitations began to run against the right of foreclosure from the day the youngest remainderman attained majority. *Subers v. Hurlock*, 82 Md. 42 (88 Atl. Rep. 409).

Sec. 549. Personal judgment in foreclosure proceedings. A judgment may be given for the debt, although the mortgage is not enforceable. *Blossom v. Westbrook*, 116 N. C. 514 (21 S. E. Rep. 198); *Moors v. Sanford*, 2 Kan. App. 243 (41 Pac. Rep. 1064). A stipulation in the decree giving plaintiff a personal judgment against defendant cannot be defeated by showing a parol agreement that the plaintiff was to bid in the property at the amount of his judgment, which he failed to do. *Mutual Life Ins. Co. v. O'Donnell*, 146 N. Y. 275 (40 N. E. Rep. 787; 48 Am. St. Rep. 796). Cal. Code Civ. Proc., § 258, applied—deficiency judgment. *First Nat. Bank v. Pardee*, 16 Mont. 390 (41 Pac. Rep. 77). Under Wyo. Sess. Laws, 1890-91, Ch. 70, subd. 14, § 9, which requires the presentation of a claim against a decedent's estate before any action can be maintained thereon, it is held that where an action to foreclose the mortgage of the decedent is commenced against his administrator without presenting the mortgage debt as a claim against the estate, it is error to render personal judgment against the estate for a deficiency. *O'Keefe v. Foster*, Wyo. (40 Pac. Rep. 525). Under Hill's Wash. Code, vol. 2, § 628, which provides that where there is an express agreement secured by a mortgage, "the court shall direct in the decree of foreclosure that the balance due on the mortgage, and costs, which may remain unsatisfied after the sale of the mortgaged premises, shall be satisfied from any property of the mortgage debtor," it is held that a personal judgment for the deficiency may be entered at the time of the foreclosure, and, under one execution issued thereon, the officer may sell not only the mortgaged property, but such other property of the judgment debtor as is necessary to satisfy the judgment. *Shumway v. Orchard*, 12 Wash. St. 104 (40 Pac. Rep. 634). Where the note is signed by one as "trustee" a deficiency judgment may be recovered against such trustee, but not against his *cestuis que trustent*. *Farrel v. Reed*, 46 Neb. 258 (64 N. W. Rep. 959). One who has pro-

cured a decree for a lien and a personal judgment may release his lien and enforce the personal judgment by execution. *Finch v. Turner*, 21 Colo. 287 (40 Pac. Rep. 565).

Sec. 550. Allowance of attorney's fees in foreclosure proceedings. A provision in a mortgage for attorney fees unless sanctioned by statute is held to be void. *Kittermaster v. Brossard*, Mich. (63 N. W. Rep. 75). In North Carolina it is held that a stipulation that, in case of foreclosure, the mortgagor is to pay attorney fees, is evidence of usury and is against public policy and invalid. *Williams v. Rich*, 117 N. C. 235 (23 S. E. Rep. 257). Where the mortgage provides for a reasonable attorney fee it is error for the court to allow a given sum without proof that such sum is a reasonable fee. *Kellogg v. Singer Mfg. Co.*, 85 Fla. 99 (17 So. Rep. 68). Where foreclosure proceedings are sought to be terminated by the tender of the amount due and the mortgage contains a provision for reasonable attorney's fees in case of foreclosure, this provision may be satisfied by a tender of an amount sufficient for reasonable compensation for plaintiff's attorney up to the time of the tender. *Smith v. Jackson*, 153 Ill. 399 (39 N. E. Rep. 130). A stipulation in a deed of trust binding the mortgagor to pay all fees and charges of the trustee incurred in the execution of the trust was held to include attorney's fees for the foreclosure of the trust deed; and where the mortgage debt amounted to \$43,000, an allowance of \$2,250 as attorney's fees was held not excessive. *Guignon v. Union Trust Co.*, 156 Ill. 135 (40 N. E. Rep. 556; 47 Am. St. Rep. 186). Where a mortgage expressly stipulated that it is given to secure the payment of the principal and interest of the note it cannot be enforced to secure attorney fees provided for in the note. *Rafferty v. High*, Cal. (41 Pac. Rep. 489). In construing a mortgage upon a number of lots, so made as to amount to a separate and distinct mortgage on each lot to secure the payment of a separate and distinct sum of money, containing a stipulation that, in case default was made as to payment on any one lot, foreclosure might be had agreeably to the statute, and out of the proceeds of the sale the mortgagee might "retain all costs and charges, including twenty-five dollars attorney's fees, for foreclosing the mortgage in each and

every such case," it is held, that for a single foreclosure, although against a number of lots, the attorney's fee properly chargeable was twenty-five dollars, and no more. *Eliason v. Sidle*, 61 Minn. 285 (62 N. W. Rep. 730). Minn. Gen. Stat. 1894, § 6051 (Gen. Stat. 1878, Ch. 81, § 23), requiring a party foreclosing a mortgage, or his attorney, to make and file within ten days thereafter an affidavit of the amount paid or incurred for costs, attorney fees and disbursements, is mandatory. *Johnson v. Northwestern L. & B. Ass'n*, 60 Minn. 398 (62 N. W. Rep. 881); *Brown v. Scandia Bldg. & L. Ass'n*, 61 Minn. 527 (63 N. W. Rep. 1040). A stipulation binding the mortgagor to the payment of a reasonable attorney's fee the mortgagee may incur in the foreclosure by a sale under the power, or by a foreclosure in equity, does not make such mortgagor liable for attorney's fees incurred by the mortgagee in an action prosecuted to compel the mortgagor to elect to affirm or avoid a sale of the land, made under a power in the mortgage, at which the mortgagee became a purchaser. *Pollard v. Amer. Freehold L. M. Co.*, 103 Ala. 289 (16 So. Rep. 801). In construing Minn. Gen. Stat. 1878, Ch. 81, §§ 44, 45 (Gen. Stat. 1894, §§ 6074, 6075), which provides that the stipulated attorney's fees, in a mortgage, to be paid in case of foreclosure, shall not exceed the sums therein limited, and that no attorney's fees shall be taxed or retained by the mortgagee on the foreclosure of the mortgage, unless he in fact employs and pays an attorney, it is held that stipulated attorney's fees in a mortgage are no part of the debt and cannot be recovered by the mortgagee except to indemnify him on account of money actually paid out for attorney's fees, and it is also held that where a corporation employed a firm of attorneys to foreclose its mortgages, and actually paid them for such services the amount stipulated therein as attorney's fees, it is legally entitled to retain the amount so paid out of the proceeds of the mortgage sales, as indemnity for such payment, although one of the members of such law firm was at the time a director of the corporation, and its general attorney, receiving a salary from it under a contract which provided that for foreclosing mortgages he should receive the attorney's fees stipulated in the mortgage.

Morse v. Home S. & L. Ass'n, 60 Minn. 816 (62 N. W. Rep. 112).

Sec. 551. Foreclosure by suit—Adjudication of adverse claims of third parties. A party to a foreclosure proceeding who is not a party to the mortgage cannot have his adverse claim of title litigated in such proceeding. *California S. Dep. & T. Co. v. Cheney Elec. L. T. & P. Co.*, 12 Wash. St. 138 (40 Pac. Rep. 732). The court say: "The rule is laid down in 2 Jones, Mortg. § 1859, as follows: 'Only the rights and interests under the mortgage and subsequent to it can properly be litigated upon a bill of foreclosure. One claiming adversely to the title of the mortgagor cannot be made a party to the suit for the purpose of trying his adverse claim. * * * This prior claim is not a subject matter of litigation in the foreclosure suit, and remains unaffected by it.' This rule is upheld by the great weight of authority upon the question. *Dial v. Reynolds*, 96 U. S. 340; *Peters v. Bowman*, 98 U. S. 58; *Hambrick v. Russell*, 86 Ala. 199 (5 So. Rep. 298); *Bank v. Thompson*, 55 N. Y. 7; *Pelton v. Farmin*, 18 Wis. 234; *Lyman v. Little*, 15 Vt. 576; *Banning v. Bradford*, 21 Minn. 308 (18 Am. Rep. 398); *Bank v. Goldman*, 75 N. Y. 127; *Wilkinson v. Green*, 34 Mich. 220; *Cody v. Bean*, 98 Cal. 578 (29 Pac. Rep. 223); *Lange v. Jones*, 5 Leigh, 192; *Bogey v. Shute*, 4 Jones Eq. 174. Parties made defendants upon the general allegation that they claim some interest which is junior to the mortgagee, can by their demurrer raise only the question as to whether the complaint shows a valid mortgage as between the parties thereto. *Howard v. Iron & Land Co.*, 62 Minn. 298 (64 N. W. Rep. 896).

Sec. 552. Rights of prior incumbrancers. In the recent case of *Jacobie v. Mickle*, 144 N. Y. 237 (39 N. E. Rep. 66), the court of appeals of New York say: "It has been held that where the prior incumbrancer has been made a party defendant in the foreclosure action, under a complaint in the usual form, alleging that such incumbrancer's interest is subordinate to the mortgage, and containing the usual prayer for judgment, and the usual judgment in foreclosure is rendered, the interest of the incumbrancer is not cut off by the

sale under such a judgment. *McReynolds v. Munn*, 2 Keyes, 214; *Lewis v. Smith*, 9 N. Y. 502 (61 Am. Dec. 706); *Bank v. Goldman*, 75 N. Y. 127; *Smith v. Roberts*, 91 N. Y. 470; *Holcomb v. Holcomb*, 2 Barb. 20. But where the complaint in the foreclosure action alleges the prior incumbrance, and prays for relief that the amount due thereon be ascertained, and that such amount be first paid out of the proceeds of the sale in foreclosure, and the judgment follows the prayer of the complaint, it has never been doubted in any case that the prior incumbrancer suffering default in such an action is concluded by the judgment therein. In such an action the court has jurisdiction of the subject of the action and the parties, and it cannot be doubted that it can render judgment against a defaulting defendant in precise accordance with the prayer for relief."

Sec. 553. Rights of junior incumbrancers. A junior incumbrancer will not be permitted to go into equity to enforce the incumbrance of the senior and his own, for the payment first of the demand of the senior, and next of his own. His remedy is to redeem the land from the senior incumbrance, and then proceed to enforce his lien upon the land for his reimbursement of the redemption money and the satisfaction of his own demand. *Mims v. Cobbs*, Ala.

(18 So. Rep. 309). The holder of a junior mortgage is entitled, as against the mortgagor, to any surplus arising from a sale under an older mortgage. *Clapp v. Hadley*, 141 Ind. 28 (39 N. E. Rep. 504; 50 Am. St. Rep. 308), and for that reason a cross complaint by a defendant mortgagee alleging superiority of his mortgage should not be dismissed upon a finding that his mortgage was in fact inferior. *Potter v. Grady*, 21 Colo. 74 (39 Pac. Rep. 1091). Where a mortgagee holding a first lien proceeds by equitable petition for the foreclosure of his mortgage, and the holder of a junior mortgage likewise proceeds in a separate suit at law, the former cannot, by amending his petition and enjoining the suit of the latter, thus compelling him involuntarily to litigate his rights under the proceeding first instituted, acquire a right to have any portion of the proceeds of the mortgaged property which would otherwise be applied to the extinguishment of the

junior lien, appropriated to the payment of the fees of the counsel representing the senior lien. And this was true even though it was necessary to the preservation of the mortgaged property to enjoin the separate proceedings of the junior mortgagee. Section 2942, of the Code, is not applicable to a case of this kind. *Lowry Banking Co. v. Holliday*, 95 Ga. 146 (22 S. E. Rep. 42). The holder of a junior mortgage who, after foreclosure of the same without making the senior mortgagee a party, but before sale, purchases the senior mortgage and then becomes a purchaser at his own sale, does not acquire any right, as against the mortgagor, to a decree applying the surplus proceeds of the sale towards the liquidation of the mortgage purchased. *Hooper v. Castetter*, 45 Neb. 67 (68 N. W. Rep. 185). The holder of a junior judgment lien has a right to redeem from a prior mortgage or to have a sale of the land, the surplus over and above the mortgage to be applied on his judgment. *Raisin Fertilizer Co. v. Bell*, 107 Ala. 261 (18 So. Rep. 168).

• **Sec. 554. Sales upon foreclosure by suits.** A sale cannot be enjoined because the judgment of foreclosure was not signed by the judge. *Gordon v. Bodwell*, 55 Kan. 181 (39 Pac. Rep. 1044). A provision in a school fund mortgage requiring the sale to be for "cash in hand" was held to be satisfied by a sale for sufficient mortgage securities. *Snyder v. Chicago, S. F. & C. Ry. Co.*, 181 Mo. 568 (33 S. W. Rep. 67). A sale upon a date different from that designated in the decree, if confirmed by the court, will be valid. *Farmers' L. & T. Co. v. Oregon Pac. R. Co.*, 28 Ore. 44 (40 Pac. Rep. 1089). A sale made on October 10, county court day, which was erroneously advertised to be made on October 12, county court day, will not be confirmed, although county court day was on the first named date. *Hendrix v. Nesbitt*, 96 Ky. 652 (29 S. W. Rep. 627). Particular directions in the writ given an officer under a decree of foreclosure must be strictly followed by him. *Danneel v. Klein*, 47 La. 928 (17 So. Rep. 466). Where the mortgagor has sold a part of the mortgaged premises before foreclosure the purchaser is entitled to an order directing the sale of the part owned by the mortgagor before the sale of that portion claimed by him. *Solicitor's L. & T. Co. v. Wash-*

ington & I. R. Co., 11 Wash. St. 684 (40 Pac. Rep. 844). A trial court is invested with considerable discretion in confirming or vacating a sale, and, unless that discretion has been unwisely exercised and abused, an appellate court will not disturb the ruling made. *Fowler v. Krutz*, 54 Kan. 622 (38 Pac. Rep. 808). After an assignment of a judgment of foreclosure a sale cannot be had in the name of the assignor. *Moore v. Smith*, 103 Mich. 387 (61 N. W. Rep. 538). An appraisement made under an order of sale can be assailed only for fraud, and not for an error in judgment. *Ecklund v. Willis*, 44 Neb. 129 (62 N. W. Rep. 493); *Kearney L. & Inv. Co. v. Aspinwall*, 45 Neb. 601 (63 N. W. Rep. 827). Where a purchase is by the mortgagee and it is evident that the mortgagor has suffered serious loss, a resale may be ordered upon the giving of bond that in the event of such resale, the value of the property as claimed by the mortgagor, will be realized. *Rowan v. Condon*, 53 N. J. Eq. 385 (33 Atl. Rep. 404). Where upon foreclosure sale the property is purchased by a third person under an arrangement with the heirs of the mortgagor, part of the purchase price being paid by one of them, and a mortgage executed by the purchaser to the original mortgagee to secure the balance, equity will not set aside the sale at the instance of such heirs without reviving the original mortgage. *DeMey v. DeFer*, 103 Mich. 239 (61 N. W. Rep. 524). Where a defendant relying upon a parol agreement with the plaintiff's attorney that he would bid the full amount of his judgment at the sale, fails to attend the sale, and the agreement is violated, the court may order a resale. *Mutual Life Ins. Co. v. O'Donnell*, 146 N. Y. 275 (40 N. E. Rep. 787; 48 Am. St. Rep. 796). The attorneys to foreclose a mortgage made to a trustee for the security of bondholders—the same attorneys being also the attorneys for the receiver—are disqualified, by their professional engagement and relation, from purchasing for their own benefit the mortgaged property, when sold by the receiver under the decree of foreclosure. The consent of the trustee, without the consent of the bondholders, will not remove the disqualification. The associates of the attorneys in making the purchase are affected by the disqualification of the latter. *Kreitzer v. Crovatt*, 94 Ga. 694 (21 S. E. Rep. 585). Hill's Wash. Code, Vol. 2, §§

504, 508, applied—confirmation of sale. *Feeb v. Brewer*, 11 Wash. St. 264 (89 Pac. Rep. 655).

Sec. 555. Sales upon foreclosure by suit—Rights and liabilities of purchaser. As against the mortgagor, a purchaser acquires title to all the property conveyed by the mortgage, although the complaint, decree and deed in the foreclosure proceedings failed to give such description as would pass the whole of said premises. *Bernstein v. Nealis*, 144 N. Y. 847 (89 N. E. Rep. 828). A purchaser at a mortgage foreclosure sale will not be relieved from completing his purchase on account of defective title, or on the ground of there being prior incumbrances on the property, when the true condition of the title is fully set out in the pleadings and the record of the proceedings under which the sale was made, as he is chargeable with notice of such material facts as the record discloses. *Hooper v. Castetter*, 45 Neb. 67 (68 N. W. Rep. 185). When there is a mistake made in the order of sale, in that the title is not recited therein, as stated in the mortgage, the purchaser is entitled to be relieved from the liability of his purchase upon discovery of such error before confirmation. *Mitchell v. Kinnard*, Ky. (29 S. W. Rep. 809). One who purchases at a referee's sale, under a judgment enforcing a contract, in the nature of a mortgage, which judgment directs the payment of taxes out of the proceeds of sale and permits the assignment of the tax leases and certificates to the purchaser, takes his title by virtue of such decree and sale and cannot assert priority, on account of the payment of such taxes, over a mortgagee whose mortgage is superior to the contract enforced by the judgment. *Oliphant v. Burns*, 146 N. Y. 218 (40 N. E. Rep. 980). The right of a tenant of the mortgagor to crops which are unmaturing at the time of the confirmation of the sale is superior to that of the purchaser who has never taken possession, but merely notified the tenant that he would expect rent. *Monday v. O'Neil*, 44 Neb. 724 (68 N. W. Rep. 82). At common law a purchaser at a foreclosure sale is entitled to the rent payable out of the crop maturing at the time of the sale, and this right is not affected by a statute providing for an apportionment of rents in case of execution sale. Del. Rev. Code, Ch. 8, p. 680, § 28, applied. *Williams v. Cochran*, 8

Hous. (Del.) 420 (81 Atl. Rep. 1050). S. Dak. Comp. Laws, § 5159, providing that "the purchaser * * * is entitled to receive from the tenant in possession the rents of the property sold," etc., has no application to sales made at a mortgage foreclosure. *Siems v. Pierre Sav. Bank*, S. Dak.

(64 N. W. Rep. 167). Under Hill's Wash. Code, Vol. 2, § 519, a purchaser at a foreclosure sale has the right to possession and the rents and the profits of the property from the date of the sale until redemption. *Hardy v. Herriott*, 11 Wash. St. 460 (89 Pac. Rep. 958). In an action under How. Mich. Stat., Vol. 3, § 8295, subd. 3, to recover possession of the premises sold from one holding over after the expiration of time for redemption, it is held that the fact and validity of the mortgage sale may be tried. *Gage v. Sanborn*, Mich.

(64 N. W. Rep. 82). The assignment of a mortgage and the execution of a quitclaim deed by the mortgagee who has become a purchaser at his own sale, during the time for redemption, does not annul the foreclosure, but conveys all the interest of the mortgagee. *Gage v. Sanborn*, Mich.

(64 N. W. Rep. 82).

Sec. 556. Foreclosure by advertisement. A bank may foreclose a mortgage by advertisement, and the fact that its directors authorize such action may be shown by parol. How. Mich. Stat., volume 1, § 8142; volume 3, § 8208b, applied. *Gage v. Sanborn*, Mich. (64 N. W. Rep. 82). Where a mortgagee has a right to pay taxes and have such payment protected by the lien of his mortgage, he may claim an allowance for taxes paid after notice of foreclosure by advertisement but before the day of sale, the notice stating that the premises would be sold to pay the debt secured, interest and taxes. *Gorham v. National L. Ins. Co.*, 62 Minn. 327 (64 N. W. Rep. 906). Where subsequent to the execution of the mortgage the premises are subdivided into town lots laid off with reference to established streets and alleys, each parcel wholly surrounded by such streets and alleys is a distinct tract and must be sold as such. *Bay View Land Co. v. Myers*, 62 Minn. 265 (64 N. W. Rep. 816). In construing Minn. Gen. Stat. 1878, Ch. 81, § 6, subd. 2, which provides that a notice of foreclosure by advertisement shall specify "the date of the

mortgage and when recorded," it is held that a notice which does not state the true date of the mortgage, is insufficient, and a sale made thereunder is illegal and void. *Clifford v. Tomlinson*, 62 Minn. 195 (64 N. W. Rep. 381). A mortgagee present in person or by an agent, having an opportunity to bid all he desires, who becomes a purchaser, cannot have the sale set aside on the ground either that he bid less than he ought to, or an irregularity in the sale which did not injure him. *Middlesex Banking Co. v. Lester*, S. Dak. (64 N. W. Rep. 168). An irregularity with reference to a sale *en masse* or sale in parcels does not render the sale void, but voidable only, upon the motion of some interested party who shows himself injured thereby. *Middlesex Banking Co. v. Lester*, S. Dak. (64 N. W. Rep. 168). A deed executed in pursuance to a foreclosure by advertisement passes only the estate of the mortgagor and does not divest a superior lien thereon. *Laird-Norton Co. v. Herker*, S. Dak. (62 N. W. Rep. 104). Where a statute (N. Dak. Compiled Laws, § 5423) requires an officer "to complete the sale by executing a deed of the premises to the original purchaser, his heirs or assigns, or to any person who may have acquired the title and interest of such purchaser by redemption, or otherwise," and he makes a conveyance to one other than the original purchaser, the legal presumption that a public officer does his duty is not of itself sufficient proof that the party to whom the conveyance is made has legally succeeded to the original rights of the purchaser. *Hanna v. Chase*, 4 N. Dak. 351 (61 N. W. Rep. 18; 50 Am. St. Rep. 656). "Neither before or after confirmation of the report of sale will a resale be ordered upon an offer of increase of price alone." *Middlesex Banking Co. v. Lester*, S. Dak. (64 N. W. Rep. 168).

Sec. 557. Power of sale. The giving of the power of sale in a mortgage does not preclude its foreclosure in a suit in equity. *Martin v. Ward*, 60 Ark. 510 (30 S. W. Rep. 1041). Citing, *Pingrey*, Mortg. § 1736; *Jones*, Mortg. §§ 1443, 1773; *Green v. Gaston*, 56 Miss. 751; *Vaughn v. Marable*, 64 Ala. 67. A power to sell includes the power to convey. *Lang v. Stansel*, 106 Ala. 389 (17 So. Rep. 519). The provisions of Ark. Act. March 17, 1879, "to regulate the sale of property

under mortgages and deeds of trusts," apply only to sales by virtue of a power of sale contained in such instruments. *Martin v. Ward*, 60 Ark. 510 (30 S. W. Rep. 1041). A sale required to be made at the door of the court house may properly be made at the door of the court house as it exists at the time of the sale. *Snyder v. Chicago, S. F. & C. Ry. Co.*, 181 Mo. 568 (88 S. W. Rep. 67). Where two notes payable respectively on October 1, 1881, and October 1, 1882, are secured by a mortgage, containing a power of sale, which stipulates that it is to secure "the true and prompt payment of the same on the 1st day of October, 1882, * * * but, if default be made in the payment of said amount, or any part thereof," the mortgagee was empowered to sell, it was held that such power of sale could not be exercised until after default in the payment of the note last due. *Keith v. McLaughlin*, 105 Ala. 339 (16 So. Rep. 886). A power of sale given a mortgagee need not be personally exercised by himself but may be performed through the instrumentality of an agent. *Palmer v. Young*, 96 Ga. 246 (22 S. E. Rep. 928; 51 Am. St. Rep. 136). A sale under power for a larger sum than the amount due is valid in the absence of proof of fraud, or that the property or the rights of the mortgagor are injuriously affected, or that bidders were deterred from attending the sale. *Savings & Loan Soc. v. Burnett*, 106 Cal. 514 (39 Pac. Rep. 922). Citing, *Fencks v. Alexander*, 11 Paige, 619; *Hamilton v. Lubukee*, 51 Ill. 415; *Fairman v. Peck*, 87 Ill. 160. The admission of the right to foreclose under the power by all parties interested is sufficient to protect a purchaser at the sale. *Bradford v. King*, 18 R. I. 743 (31 Atl. Rep. 166). A foreign administrator may execute a power of sale contained in a mortgage given to his intestate. *Thurber v. Carpenter*, 18 R. I. 782 (31 Atl. Rep. 5). A sale by an administrator of the mortgagee is not invalid on account of the notice thereof being signed by such administrator as "Assignee of the Mortgagee." *Thurber v. Carpenter*, 18 R. I. 782 (31 Atl. Rep. 5). A provision authorizing the mortgagee to pay out of the proceeds "all expenses incident to such sale," does not entitle the mortgagee to commissions for making the sale. *Johnson v. Glenn*, 80 Md. 369 (30 Atl. Rep. 993). The sale, under a power of sale in a mortgage, of a truck garden, will not be set aside on

account of the failure of the advertisement to specifically mention the fact that there were vegetables growing on the land of the value of \$400.00, where said advertisement referred to the land as being "in a good state of cultivation and a very desirable truck farm," it appearing that the sale was in all respects fair and that no harm resulted from the failure to give a more specific description of the character of the land. *Lepper v. Mooyer*, 82 Md. 649 (33 Atl. Rep. 263). One having an absolute title to bonds secured by a mortgage cannot be enjoined by the mortgagor from executing a power of sale contained in the mortgage until such mortgagor can obtain an adjudication upon certain unliquidated and disputed claims which he has against the mortgagee. *National Rubber Co. v. Rhode Island H. T. Co.*, R. I. (33 Atl. Rep. 254).

Sec. 558. Power of sale—Purchase by mortgagee. A power may authorize the mortgagee to purchase the land himself but in the exercise of such power the burden is on him to show the absence of fraud; however, the mortgagor may be estopped to question such purchase, where it appears to be fair and the price reasonable, by his acquiescence. *Jones v. Pullen*, 115 N. C. 465 (20 S. E. Rep. 624). A purchase by a mortgagee at his own sale, under a power which did not authorize him to become purchaser, makes him a trustee to the mortgagor as to the rents and profits which he is bound to apply to the payment of the debt. *Loveplace v. Hutchinson*, 106 Ala. 417 (17 So. Rep. 623). Where a power of sale is given to the mortgagee, although it does not expressly so provide, the mortgagee may purchase at such sale, and if the sale is made fairly and without fraud it is not void, but only voidable at the election of the mortgagor to redeem at any time before final judgment of eviction. *Palmer v. Young*, 96 Ga. 246 (22 S. E. Rep. 928; 51 Am. St. Rep. 136); *Pollard v. Amer. Freehold L. M. Co.*, 103 Ala. 289 (16 So. Rep. 801). In Alabama it is held that a court of equity will entertain a bill in such cases to require the mortgagor or whoever may have succeeded to the equity of redemption to manifest and exercise the election to affirm or disaffirm the purchase. *Pollard v. Amer. Freehold L. M. Co.*, 103 Ala. 289 (16 So. Rep. 801); and where such a purchase is made at a sale,

made after the death of the mortgagor, his infant heirs may disaffirm it at any time within two years after attaining their majority, provided twenty years have not elapsed. *Loveplace v. Hutchinson*, 106 Ala. 417 (17 So. Rep. 628).

Sec. 559. Deeds of trust—Sales under. A trust deed to secure bonds is inoperative until the bonds have been sold. *Wade v. Donau Brewing Co.*, 10 Wash. St. 284 (38 Pac. Rep. 1009). In the case of the death of the trustee neither his heirs nor his personal representatives are necessary parties to a bill for its foreclosure. *Read v. Rowan*, 107 Ala. 366 (18 So. Rep. 211). A court of equity will not cancel a deed of trust on account of usury until the debtor repays the principal of the debt with legal interest. *Salter v. Embrey*, Miss. (18 So. Rep. 878). Where a deed of trust contains a stipulation to that effect it is held that compensation for the services of the trustee may be included in a judgment of foreclosure. *Guignon v. Union Trust Co.*, 156 Ill. 185 (40 N. E. Rep. 556; 47 Am. St. Rep. 186). Where a trust deed secures several notes, one of which is secured by other security, the proceeds of sale should be first applied to the notes having no additional security. *Pope v. Transparent Ice Co.*, 91 Va. 79 (20 S. E. Rep. 940). A deed by a debtor to trustees to hold the lien as security for the benefit of the creditor, a reconveyance to be made upon payment of the debt, and a sale to be made upon default, the proceeds to be applied to the payment of a debt and the surplus to be refunded to the grantor, is a deed of trust and not a mortgage. *Savings & Loan Soc. v. Burnett*, 106 Cal. 514 (39 Pac. Rep. 922).

Sales under a deed of trust executed to secure debts, must be made strictly in accordance with the powers given in the deed. *Patch v. Morrisett*, Va. (22 S. E. Rep. 173). After its confirmation it is too late to complain that a foreclosure sale made on credit should have been made for cash as provided for in the trust deed under which the sale was made. *McGuire v. Gallagher*, 95 Tenn. 349 (32 S. W. Rep. 209). A sale of property under a deed of trust in gross is not of itself sufficient to avoid the sale. *Snyder v. Chicago, S. F. & C. Ry. Co.* 181 Mo. 568 (33 S. W. Rep. 67). Where a deed of trust required the sale to be held "at the door of the court house in a

county where the premises are situated," it was held that there being two court houses in the county the sale at the court house in the county seat was proper. *Gray v. Worst*, 129 Mo. 122 (81 S. W. Rep. 585). Where a deed made in pursuance of a sale under a deed of trust sets forth the giving of the required notice, such a deed is not invalidated by the fact that the printer's affidavit of publication of the notice omitted one of the dates. *Gray v. Worst*, 129 Mo. 122 (81 S. W. Rep. 585). Where a trust deed of land provided for a sale on default, "as in cases of foreclosing mortgages, * * * by bill in chancery, * * * by some suitable person, to be appointed in writing by any person interested in such trust fund," it was held that this provision was complied with by a sale and conveyance under judicial process made by one appointed by the next of kin to the grantee in such deed. *Lang v. Stansel*, 106 Ala. 889 (17 So. Rep. 519). Where a sale is made under a deed of trust, the Illinois Rev. Stat. 1895, Ch. 95, § 14, which requires notices of such sale to show the amount due, is sufficiently complied with where the notice sets out the amount due of the principal note and rate of interest and when payable and states that default has been made in paying interest and that the creditor has elected to declare the debt due with all interest thereon. A subsequent purchaser from one who has acquired title at a trustee's sale is not affected by slight irregularity. *Reedy v. Millizen*, 155 Ill. 686 (40 N. E. Rep. 1028). Sums expended by a trustee under a trust deed, in payment of taxes and other paramount liens, are valid charges on the property, though the instrument contains no express authority for such payments. *Savings & Loan Soc. v. Burnett*, 106 Cal. 514 (89 Pac. Rep. 922). A trust deed executed by an administratrix under an order of court to secure the payment of money borrowed to liquidate claims against the estate may be foreclosed as a mortgage. *Pershing v. Wolfe*, 6 Colo. App. 410 (40 Pac. Rep. 856).

Sec. 560. Indemnity mortgages. A mortgagee who seeks to enforce a bond of indemnity given to secure him against paramount liens will be held to a strict compliance of his part of the contract. *Pioneer Sav. & L. Co. v. Freesburg*, 59 Minn. 280 (61 N. W. Rep. 25). A mortgage given to in-

demnify a surety which fails to designate to whom the original indebtedness is due, its nature and amount, is held to be void for uncertainty. *Thompson v. Thompson*, Ky. (29 S. W. Rep. 133); *Robinson v. Sharp*, Ky. (32 S. W. Rep. 416). An indemnity mortgage executed by a husband to his wife to secure her against loss of her inchoate interest in other lands of his in the mortgaging of which she has joined, may be foreclosed by her whenever title to such other lands has been so far taken from the husband as to deprive her of any inchoate interest therein. *Milburn v. Milburn*, Ind. (40 N. E. Rep. 1082).

Sec. 561. Miscellaneous notes. A provision for an increased rate of interest on the note in case of default in payment is in the nature of a penalty and can not be enforced in equity. *Krutz v. Robbins*, 12 Wash. St. 7 (40 Pac. Rep. 415). See opinion for extensive collation of authorities. Particular facts held to be a conditional sale and not a mortgage. *Tygret v. Potter*, Ky. (29 S. W. Rep. 976). A conveyance in fee by the mortgagee to the mortgagor obliterates the mortgage. *Mutual Bldg. & L. Ass'n v. Wyeth*, 105 Ala. 639 (17 So. Rep. 45). A stipulation providing that the debt matures and that the mortgage may be foreclosed upon failure of the mortgagor to pay taxes is valid. *Parker v. Oliver*, 106 Ala. 549 (18 So. Rep. 40). A person who is in possession of land, claiming title, when the taxes accrue, or who occupies such a fiduciary relation as to make it his duty to pay the taxes, can acquire no additional title by purchasing the land at a tax sale; but a mortgagee not in possession is under no obligation to pay the taxes on the mortgaged property, and there is no reason why he may not acquire title to the property by a fair purchase at a tax sale. *Allen v. Dayton Hotel Co.*, 95 Tenn. 480 (32 S. W. Rep. 962). The general rule is that a mortgage is not the evidence of the debt, and for that reason, ordinarily, its recitals are not such as make a *prima facie* case of indebtedness on the part of the mortgagor, upon which alone a personal judgment might be rendered against him. *Holiman v. Hance*, 61 Ark. 115 (32 S. W. Rep. 488). Citing, *Scott v. Fields*, 7 Watts, 360; *Trust Co. v. Miller*, 89 Pa. St. 26; *Drummond's Adm'rs v.*

Richards, 2 Munf. 887; *Tonkin v. Baum*, 114 Pa. St. 414 (7 Atl. Rep. 185); *Smith v. Stewart*, 6 Blackf. 162; *Weil v. Churchman*, 52 Iowa 258 (8 N. W. Rep. 88); *Shelden v. Erskine*, 78 Mich. 682 (44 N. W. Rep. 146); *Brown v. Cascaden*, 48 Iowa 108; *Newberry v. Rutter*, 38 Iowa 179; *Saunders v. Milsome*, L. R. 2 Eq. 578; *Marryat v. Maryatt*, 28 Beav. 224; 1 Jones, Mortg., § 870; 2 Jones, Mortg., § 1225; 1 Ping. Mortg., § 205; 2 Ping. Mortg., §§ 1530, 2030; *Kimball v. Huntington*, 10 Wend. 675 (25 Am. Dec. 590); and *Elder v. Rouse*, 15 Wend. 218. The holder of an unforeclosed mortgage on property brought to sale under a general judgment junior to the mortgage can not, without the consent of the mortgagor and the plaintiff in execution, cause the entire estate to be sold, and afterwards claim the fund in the sheriff's hands. *J. G. Hynds Mfg. Co. v. Oglesby & Meador G. Co.*, 98 Ga. 542 (21 S. E. Rep. 63). For further opinion in this case, see *Oglesby & Meador G. Co. v. Hynds Mfg. Co.*, 96 Ga. 748 (22 S. E. Rep. 228). A mortgage given to secure a forged note may be enforced where the mortgagee acts without notice of the fraud and without any fault or negligence. *Medlin v. Burford*, 117 N. C. 278 (23 S. E. Rep. 217). In California it is held that where a mortgage on its face purports to secure a note, the mortgagee cannot release the security and maintain an action on the note. *Hibernia Sav. & L. Soc. v. Thornton*, 109 Cal. 427 (42 Pac. Rep. 447; 50 Am. St. Rep. 52). A deed by a mortgagor to the mortgagee of the mortgaged premises in satisfaction of the debt is valid without the existence of a new consideration. *Watson v. Edwards*, 105 Cal. 70 (38 Pac. Rep. 527). An agreement by a mortgagee, in consideration of his mortgagor making no resistance to a foreclosure, to foreclose his mortgage and bid in the property for the amount of the judgment without any personal judgment for a deficiency, may be enforced. *Heim v. Butin*, Cal. (40 Pac. Rep. 89). In case of the death of a mortgagor the mortgage creditor must exhaust his lien before proceeding against the personal estate of the debtor. *Macgill v. Hyatt*, 80 Md. 253 (30 Atl. Rep. 710). The mortgagee of a leasehold estate may by his acts ratify the acceptance of a new lease by the lessee in which some changes in the description of the property are

made, and subsequently acquire title holding the property as described in the second lease. *Judik v. Crane*, 81 Md. 610 (32 Atl. Rep. 276). A purchaser of land who takes his title subject to two mortgages holds subject to the second mortgage even after he purchases at the foreclosure sale under the first mortgage. *Kennedy v. Borie*, 166 Pa. 360 (31 Atl. Rep. 98). Though, under the rules of the commercial law, equities might be barred as against the personal liability of the maker of a promissory note, it does not follow that the equities could not be invoked against the enforcement of a mortgage securing the note. Mortgages are not negotiable. When the public records disclose the existence of equities, or facts from which presumptions of their existence flow, parties taking mortgages are put upon inquiry, and are not entitled to protection in their mortgage rights solely by reason of the facts that they are the holders of negotiable notes transferred to them by indorsement, before maturity, for value, and in due course of trade. When protection is given to holders of mortgages against equities, it rests not upon the negotiability of notes or mortgages, but upon principles of law and equity, which forbid that the binding force of mortgages should be destroyed by secret equities of which the holders of the mortgage had no notice, and for the ascertainment of which the public records furnished him no means of information. *Layman v. Vicknair*, 47 La. 679 (17 So. Rep. 265).

NOTICE.

EPITOME OF CASES.

Sec. 562. Constructive notice—Possession—Records. In a recent case it is said: "The general rule is that notice of a lease will affect the purchaser of real estate with notice of the covenants contained in it. If, with knowledge of a lease, he buys without examining it, he cannot afterwards object that he had no notice of a particular covenant. The equity of a tenant in possession may extend still further, and

notice of unusual covenants, and even of a collateral agreement to purchase, may be imputed to the vendee. This equity, however, rests upon the fact of possession, which is notice to the purchaser of the occupant's title, and of the fact that the property is affected, and imposes upon him the duty of inquiry. The purchaser is therefore chargeable with notice, not only when the evidence raises a presumption that he knew, but also when there is just ground for inferring that reasonable diligence would have led him to discover the truth. But this rule of constructive notice by tenancy does not apply to controversies between the vendor and the vendee. Facts which, in a controversy with a third party whose rights have been prejudiced by the sale, would affect the vendee with constructive notice, will not charge him with defects in the vendor's title. 2 White & T. Lead. Cas. Eq. pt. 1, p. 145. While the vendee is put to inquiry as to the tenant's title, the duty of inquiry arises because of the possession. In protection of innocent parties, the doctrine of implied notice has been carried to its fullest extent. As between the vendor and the vendee, the latter is held to have had notice of the covenants of a lease of which he knew, but had not examined and as to the contents of which he has not been misled, but he is not charged with notice of a distinct collateral agreement." *Wertheimer v. Thomas*, 168 Pa. St. 168 (81 Atl. Rep. 1096). An intending purchaser or mortgagee of real estate is bound to know the contents of the records, and if he replies and acts upon the recitals of an abstract, made of the title to such real estate, he does so at his peril. *Rice v. Winters*, 45 Neb. 517 (63 N. W. Rep. 880).

Sec. 563. Knowledge of facts sufficient to put one upon inquiry. The law is well settled that a man is regarded as notified of whatever appears in the instruments which constitute his chain of title, and whatever is sufficient to put him on chain of inquiry is sufficient to charge him with whatever an ordinarily diligent search would have disclosed. All those referred to as being in any way connected with the title as well as those upon which the title is based must be examined as to any facts they may contain at the purchaser's peril. One who thus fails to search the record when it is his duty to do

so cannot invoke the aid of a court of equity to relief from the consequences of his own want of diligence. *Mettart v. Allen*, 139 Ind. 644 (39 N. E. Rep. 239). The pendency of proceedings to settle an estate is not notice to one dealing with the administratrix in regard to land to which she holds the legal title that the estate has an interest therein. *Seibel v. Bath*, Wyo. (40 Pac. Rep. 756).

Sec. 564. Knowledge by one who acts for another—When imputed. It is held that where an attorney is retained by an insolvent debtor for the purpose of securing liens on his property in favor of his creditors who afterwards ratify his acts, they are chargeable with notice of an unrecorded mortgage of which the attorney had actual notice at the time of the transaction. *Hass v. Sternbach*, 156 Ill. 44 (41 N. E. Rep. 51). As to trustees who take a joint legal title, notice to one is notice to all. *Chapman v. Chapman*, 91 Va. 397 (21 S. E. Rep. 813; 50 Am. St. Rep. 846). Where a wife takes a conveyance through the agency of her husband she is chargeable with notice to him. *Miller v. Whelan*, 158 Ill. 544 (42 N. E. Rep. 59). In a transaction where a corporate officer or agent is acting in his own interest as in the sale of his land to the corporation, the corporation is not charged with his knowledge. *Bang v. Brett*, 62 Minn. 4 (63 N. W. Rep. 1067).

Sec. 565. Service by publication. A suit for specific performance against a non-resident can not be maintained on a service by publication only on the ground that the suit is *in personam*. *Merrill v. Beckwith*, 163 Mass. 503 (40 N. E. Rep. 855). Notice by publication must be made in strict compliance with the statute. Mo. Rev. Stat. 1889, §§ 2013, 2022, 2023, 2024, applied. *Harness v. Cravens*, 126 Mo. 233 (28 S. W. Rep. 971). S. C. Code Civ. Proc., § 156, is not complied with by levying an attachment on land within the state belonging to a nonresident defendant and leaving a copy at his place of residence out of the state in his absence without publishing the summons. *Armstrong v. Brant*, 44 S. C. 177 (21 S. E. Rep. 634). Designation of a person by the initial of his given name in a notice by publication was held sufficient as against a collateral attack on a judgment. *Moseley v. Riley*, 126 Mo. 124 (28 S. W. Rep. 895; 26 L. R. A. 721). Where

“ John Owen ” C. and “ Elizabeth Alicia ” C. were sued and served by publication as “ Owen ” C. and “ Elisha ” C., it was held that there was a misnomer and the judgment was void. *Corrigan v. Schmidt*, 126 Mo. 804 (28 S.W. Rep. 874). Ky. Civ. Code, § 58, subd. 2, applied—sufficiency of affidavit for service by publication. *Perkins v. McCarley*, Ky. (29 S. W. Rep. 867). On the subject generally, see Ballards' Annual, Vol. 1, §§ 326, 576; Vol. 2, §§ 330, 331, 494; Vol. 3, § 549.

NUISANCE.

EPITOME OF CASES.

Sec. 566. As to what may constitute a nuisance. It has been held by a divided court that a steam merry-go-round may be a nuisance which may be abated by the town authorities, *Town of Davis v. Davis*, 40 W. Va. 464 (21 S. E. Rep. 906); and so may a variety concert hall, *Koehl v. Schoenhausen*, 47 La. 1316 (17 So. Rep. 809); a blacksmith shop operated at night in a residence part of the city, *Peacock v. Spitzelberger*, Ky. (29 S. W. Rep. 877); or a shop devoted to boat repairing, *McMorran v. Fitzgerald*, Mich. (64 N. W. Rep. 569). It is held that a market place with scales for the weighing of products and hitching posts for the accommodation of those visiting the market, is not *per se* a nuisance, and that the reasonableness of the ordinance establishing the same cannot be inquired into on the hearing of an application for an injunction in a proceeding brought by a private citizen. *Miller v. Webster City*, Ia. (62 N. W. Rep. 648). However injurious the natural flow or drainage from the land of one upon or through the land of another may be, there is no action for the injury, as a nuisance cannot be said to exist in a legal sense from the failure of one to change the flow of water from springs from nature itself, and not from the act of the owner. *Livezey v. Schmidt*, 96 Ky. 441 (29 S. W. Rep. 25). A mill, manufacturing powder and other explosives, and storing the same on

the premises, situate on the bank of the Ohio river and near two railroads and a public road, is a public nuisance, and any one injured in property by explosion of powder stored there may recover damages without proof of negligence in its operation. *Wilson v. Phoenix Powder Mfg. Co.*, 40 W. Va. 418 (21 S. E. Rep. 1035); *Huntington & Kenova L. D. Co. v. Phoenix Powder Mfg. Co.*, 40 W. Va. 711 (21 S. E. Rep. 1037). The fact that a water works plant is erected under legislative authority, does not relieve the company operating it from liability for discharging smoke and soot from its smokestack on an adjacent residence. Such discharge constitutes a nuisance for which damages may be recovered for the deprivation of the comfortable enjoyment of the property, and the amount of damages is not limited to the depreciation of the property in its rental value. *Churchill v. Burlington Water Co.*, Ia. (62 N. W. Rep. 646). For a case with annotations, see Ballards' Annual, Vol. 1, §§ 329-333.

Sec. 567. As to who liable for — Estoppel. Where an owner of land in possession thereof, consents to and authorizes the erection thereon by a third party of a structure which creates or constitutes a nuisance, he is as liable for the consequences as if he had erected the structure himself. *Simpson v. Stillwater Water Co.*, 62 Minn. 444 (64 N. W. Rep. 1144). One who stores upon his own premises for his own use and profit large quantities of petroleum which escapes and creates a nuisance upon the premises of his neighbor, is liable therefor without proof of any negligence on his part; and the damages are not limited to the diminution of the rental value of the premises during the continuance of the nuisance, but may include compensation for actual inconvenience and physical discomfort and for any other actual injury to the health or property caused directly by the nuisance and without fault on the part of the injured persons. *Berger v. Minneapolis Gas-light Co.*, 60 Minn. 296 (62 N. W. Rep. 336). When a company engaged in the manufacture of powder and other explosives, without misrepresentation or concealment on its part, is induced to locate its works at great expense on lands adjacent to the property, and for the prospective benefit of a land development and improvement company, such latter company

cannot, on discovering that the proximity of such powder works has diminished instead of enhanced the value of its adjoining territory, enjoin the continuance of such works as a nuisance. *Huntington & Kenova L. D. Co. v. Phoenix Powder Mfg. Co.*, 40 W. Va. 711 (21 S. E. Rep. 1087).

Sec. 568. Legislative and municipal power in respect to. The maintenance of a nuisance to real estate amounts to a taking of property, and cannot be legalized by the legislature for private purposes, even upon terms of making compensation. Hence, where the right of the complainant is clear, and the facts undisputed, a court of equity is bound to give preventive relief. To refuse it is to allow the defendant to take complainant's property upon terms of paying such compensation, from time to time, as the jury may assess. *Beach v. Sterling I. & Z. Co.*, N. J. Eq. (88 Atl. Rep. 286). It is held that an ordinance prohibiting the fencing of a railroad within a city and declaring such fences a nuisance is void. *Grossman v. City of Oakland*, Ore.

(41 Pac. Rep. 5). The court say: "The charter of the city confers upon it the power to prevent and restrain nuisances, and to 'declare what shall constitute a nuisance'; but this does not authorize it to declare a particular use of property a nuisance, unless such use comes within the common-law or statutory idea of a nuisance." License from state or city authorities do not constitute a defense against a city to abate a nuisance resulting from the unauthorized use made of the license. *Koehl v. Schoenhausen*, 47 La. 1316 (17 So. Rep. 809). Under the Indiana Rev. Stat., 1894, § 4357, the trustees of an incorporated town may, by ordinance, declare a slaughter house within the corporate limits of a town to be a public nuisance and inhibit the maintenance thereof; and the courts will not inquire into the wisdom or reasonableness of such an ordinance. *Rund v. Town of Fowler*, 142 Ind. 214 (41 N. E. Rep. 456).

Sec. 569. Abatement of—Practice. A party cannot maintain an action to abate a nuisance either public or private so long as he is not injured thereby. *Wooden v. Mt. Pleasant Mfg. Co.*, Mich. (64 N. W. Rep. 829). Cal. Civ. Code, § 3498, provides, "a private person may maintain an

action for a public nuisance if it is specially injurious to himself but not otherwise.” Under this statute it is held that a riparian lot owner may maintain a suit to abate an offensive cesspool maintained by a city on a stream above his lot, when in addition to its being offensive to the public it also deposits offensive sewerage matter on his lot. *Lind v. San Luis Obispo*, 109 Cal. 340 (42 Pac. Rep. 437). While one who erects and maintains a nuisance under circumstances rendering him liable in damages to another whose property is thereby injured, may be sued, without notice to abate the nuisance, an alienee of the person erecting such nuisance must have such notice, and refuse to comply with it, before becoming liable for simply maintaining the nuisance, as it existed when he purchased the property on which it was located. Such notice, however, would not be essential to the maintenance of an action against the alienee for injuries occasioned by changes made by himself in the character or structure of the nuisance. *Middlebrooks v. Mayne*, 96 Ga. 449 (23 S. E. Rep. 398). Massachusetts Pub. Stat., Chap. 80, § 28, *et seq.*, provides that lands in a city which are wet, rotten, spongy, or covered with stagnant water shall be deemed a nuisance and authorizes the board of health to abate the same and for that purpose to enter upon the lands and construct such excavations as may be necessary. Construing and applying this statute it is held that the outflow of a private sewer on the land of another is not within its provisions. *Huse v. Amesbury Board of Health*, 168 Mass. 240 (39 N. E. Rep. 1023).

Sec. 570. Continuing nuisance—Successive actions—Damages. It is held that a nuisance to the plaintiff's cleared and tillable land (the injury consisting in overflowing or saturating the same with water), although resulting from a cause intended to be perpetually operative, and of a nature so to operate gradually and continuously, created in the year 1878, was actionable in 1884 for damages on account of diminished or suspended fertility, occasioned thereby with reference to the crops for the years 1882 and 1883, and the same nuisance having been continued with like effect was again actionable in 1888 for damages, on account of diminished or suspended fertility, with reference to the crops for the years 1884, 1885,

1886 and 1887; and the same nuisance having been continued with like effect, was again actionable in 1889 for damages, on account of diminished or suspended fertility with reference to the crop for the year 1888. If, however, the effect of the nuisance at any stage was to destroy wholly and permanently the fertility of the land so that abating the nuisance and withdrawing the excess of water occasioned thereby would not restore the land and render it again fertile, the right to maintain successive actions relatively to subsequent years ceased, and a single action and recovery for such destruction could be maintained and would be final. *Danielly v. Cheeves*, 94 Ga. 268 (21 S. E. Rep. 524). Where a ditch is constructed across the lands of another, the right of way therefor having been secured by an arbitration of the damages, and several years after the construction of the ditch the gradual percolation of the water from the ditch, owing to the character of the soil, damaged the land owners adjacent land, it was held to constitute a continuing nuisance, for which damages could be recovered as for permanent injury to the land. *Consolidated Home Supply Ditch & Reservoir Co. v. Hamlin*, 6 Colo. 341 (40 Pac. Rep. 582). See *Ballards' Annual*, Vol. 2, § 496, and Vol. 3, § 556.

PARTITION.

CARNEAL v. LYNCH.

(91 Va. 114.)

Partition by life tenant against remainderman not in being. Under the Virginia Code 1887, §§ 2432, 2562, a tenant for life may enforce partition against remaindermen not in being, on the ground that they are tenants in common within the meaning of the statute.

Notice to purchaser at partition sale. One who purchases at a partition sale is chargeable with knowledge of the contents of a plat referred to in the advertisement of the sale and exhibited at the time of sale, though he did not examine it and bought without knowing its contents.

HARRISON, J.

Sec. 571. Facts stated. This is an appeal from the decree of the chancery court of the city of Richmond. It appears from the record that Benjamin Sutton, by the sixth clause of his will, gave to his two grandsons, William M. Lynch and Charles G. Lynch, a certain house and lot on the corner of Grace and Jefferson streets, in Richmond, for their lives, with cross remainders to their children; and, in the event of death of both without issue, then said property was to pass to their sister, Mollie A. Lynch, or her issue. Charles G. Lynch died leaving two children, who, under the terms of said will, are now the fee-simple owners of their father's moiety. On the 27th day of April, 1898, William M. Lynch, the life tenant in one moiety of said property, filed his bill in the chancery court of Richmond, praying for a sale of this property for partition, and a reinvestment of the proceeds, and for general relief. To this bill he makes, as parties defendant, his own five children, remaindermen in his moiety; the two children of his brother, Charles, fee-simple owners of their father's moiety; and his sister, Mollie A. Lynch. His children and his brother's children are all infants, and appear by guardian *ad litem*. All the proceedings in the case are regular, full and complete. The commissioner's report and the evidence fully establish the propriety of granting the prayer of the bill. The court decreed the sale, and it was made, in accordance with the terms prescribed, to James D. Carneal. An upset bid was put in, and at a second sale said Carneal became the purchaser at eleven thousand five hundred seventy-five dollars; and on the 26th day of June, 1898, the court entered a decree confirming said sale, but reserving to the purchaser leave to have the title examined within a reasonable time. Counsel for the purchaser examined the title, and made two objections thereto. The court overruled both objections, and on the 9th day of August, 1898, entered a decree fully confirming the sale to J. D. Carneal, directing that he forthwith comply with the terms. It is from this decree that the case is before this court on appeal.

Sec. 572. Tenancy in common defined. There are two assignments of error, which are the two objections made

by the appellant to the title to the property. The first is that William M. Lynch being only a life tenant in one moiety of the land, the remainder of said moiety being unascertained, and the other moiety being owned in fee simple by infants, he, the said William M. Lynch, had no power in law to maintain a suit for partition and sale of the whole of said land. This presents the simple question whether a life tenant of one moiety of land can maintain a suit for partition against the remaindermen, *in esse*, of that moiety, and the fee simple owners of the other moiety. The bill is framed in a double aspect, being brought under § 2432, of the Code, which provides for the sale of contingent estates, and under § 2562, which provides for the partition of lands. This latter section provides that "tenants in common, joint tenants and coparceners shall be compellable to make partition," etc. If, then, William M. Lynch, the life tenant in one moiety, is in law a tenant in common with the children of his brother, who are the owners in fee of the other moiety, it would seem clear that he can maintain a suit to compel partition against his cotenants. Mr. Minor says: "A tenancy in common is where two or more hold the same land, with interests accruing under different titles, or accruing under the same title, but at different periods, or conferred by words of limitation importing that the grantees are to take in distinct shares." Minor, Inst. p. 494, citing, 1 Steph. Comm. 828. Judge Lomax says: "A tenancy in common is where two or more persons hold lands or tenements in fee simple, fee tail, or for term of life or years, by several titles, not by a joint title, and occupy the same lands or tenements in common, from which circumstance they are called 'tenants in common,' and their estate a 'tenancy in common.'" 1 Lomax, Dig. p. 641. According to these high authorities, one of the conditions creating a tenancy in common is where two or more persons hold the same land, with interests accruing under the same title, but at different times. The record shows that the interests in this land accrued under the same title, viz. the will of Benjamin Sutton. It further shows that the interests of William Lynch accrued not later than November 11, 1871—that being the date of the probate of Benjamin Sutton's will (the record does not show the date of Benjamin Sutton's death)—and that the interest of Dorsie

Lynch and Charlie Lynch accrued September 21, 1881; that being the date of the death of their father, Charles G. Lynch. It follows, therefore, that William M. Lynch, the life tenant of one moiety, and the children of Charles G. Lynch, fee simple owners of the other moiety, are plainly tenants in common. They hold the same land, with interest accruing under the same title, but at different times; and, being tenants in common, the right of either to compel partition in equity is provided for, and must be upheld, under § 2563 of the Code of 1887.

Sec. 573. Partition by life tenant against remaindermen not in being. We do not perceive the force of the objection that a life tenant of a part cannot maintain a suit against his cotenants, who own the fee of the other part, for partition. There can be no doubt that the fee-simple owners could maintain the suit for partition against the life tenant, as defendant, and the manner in which the parties to the suit are arranged can make no difference. A party having a life estate, determinable on his marriage, in one-fifth of an estate, applied in chancery for partition. The defendants were entitled to the remaining four-fifths, as tenants in common, in tail, and were together entitled to the reversion of the plaintiff's fifth. The defendants all desired that the property should remain undivided. The master of the rolls said, "As tenant for life, I apprehend there can be no question but that he is entitled to partition," and it was accordingly granted. *Freem. Coten.* p. 553, § 455. "A tenant for life, of an undivided share of an estate, with remainders to his unborn sons, in tail, may file a bill for partition; and the decree will be binding on the sons, when *in esse*." *Gaskell v. Gaskell*, 6 Sim. 643. "The owner of a life interest in an undivided part of land may have partition, or, if that be impracticable, a sale of the property and a division of the proceeds." *Shaw v. Beers*, 84 Ind. 528. "When the titles are clear upon the record, whatever may be the estates—whether in fee, for life, or for years—the court orders a commission of partition to issue." 2 Minor, Inst. p. 487. It is insisted by the appellants that inasmuch as the will of Benjamin Sutton provides that the moiety given to William M. Lynch for life shall pass at

his death to his children, and said Lynch is still living, therefore the owners in remainder of that interest are unascertained. Grant that this is so. Section 2482 of the Code, under which this suit is maintained, in one aspect, provides fully for the sale of all contingent interests such as exist in this case, and was intended to facilitate the sale of property where just such difficulties existed. We are therefore of the opinion that under the statutes of Virginia, as well as upon precedent, a tenant for life in one moiety of property may maintain a suit against those who own the estate in remainder of said moiety, whether *in esse* or not, and the fee-simple owners of the other half, and compel partition of said property, and, if not susceptible of partition in kind, may have a sale and division of the proceeds.

Sec. 574. Purchaser at partition sale—When chargeable with notice. The second assignment of error is that the court erred in overruling the objection of J. D. Carneal to the title on the ground that it was advertised and sold as fronting sixty-seven feet one and one-half inches on Grace street, in the city of Richmond, and running back one hundred fifty-four feet, when, as a matter of fact, it fronted on Grace street only sixty-four feet seven inches, the difference of two feet five and one-half inches being embraced in a part of Jefferson street. It appears from the record that there was a plat of this property made, distinctly showing the encroachment on Jefferson street, and that in the advertisement of the property for sale this plat was referred to as being at the auctioneer's office, where it could be seen by any who were interested in the sale. It further appears from the record that this plat, with red lines plainly defining the encroachment of two feet five and one-half inches on Jefferson street, was exhibited at the sale, examined by bidders, and the encroachment referred to, discussed in an open and general way; that J. D. Carneal, the purchaser, had every opportunity to see and examine said plot and the papers in the cause; and that, if he did not know of the encroachment of the buildings on Jefferson street, it was his own fault, and no blame attached to any one else. Carneal admits that he saw the plat at the first sale, but says that he did not examine it. His ignorance, then, of the fact

disclosed by the plat is no excuse. "It was his duty to make inquiry, and inquiry duly pursued would have led to knowledge. It will not do for him to shut his eyes, and then say that he did not see. Whatever inquiry is a duty, the party bound to make it is affected with the knowledge of all which he would have discovered, had he performed the duty. Means of knowledge, with the duty of using them, are, in equity, equivalent to knowledge itself." *Long v. Weller*, 29 Grat. 847, 853-4. But is there in fact any deficiency in the width of the lot in question, growing out of the alleged encroachment of two feet five and one-half inches on Jefferson street? The legislature, by an act approved March 10, 1884 (see Acts 1883-4, p. 494), giving the city council power to remove buildings and other obstructions, where they encroach upon the streets, expressly provides that in every case where a building encroaches upon the street on a corner lot, and has so continued for a period of twenty years, it shall constitute an adverse possession to, and confer property rights upon, the persons claiming thereunder, as against the city. It appears from the record that this lot and the buildings thereon were conveyed to Benjamin Sutton, December 30, 1858. He and those holding under him had therefore been in possession at the date of the act March 10, 1884, more than twenty-five years; and, it being a corner lot, it would seem that the legislature had confirmed the title of the owners, as against the city, to the encroachment of two feet five and one-half inches on Jefferson street. See *Meyer v. City of Lincoln*, 33 Neb. 566 (50 N. W. Rep. 763; 29 Am. St. Rep. 500); *City of Wheeling v. Campbell*, 12 W. Va. 36. For the foregoing reasons, we are of opinion that there is no error in the decree complained of, and the same must be affirmed.

Note. A decree of a probate court, having jurisdiction, assigning the residue of the estate of the deceased person is conclusive upon all persons interested in the estate, whether then in being or not. It is in the nature of a judgment *in rem* which binds all the world. *Lad v. Weiskopf*, 62 Minn. 29 (64 N. W. Rep. 99). As to how far remaindermen are affected by judicial proceedings to which they are not parties, see *Miller v. Tex. & Pac. Ry. Co.*, 132 U. S. 662, 672; *Temple v. Scott*, 143 Ill. 290 (32 N. E. Rep. 366); *Townsend v. Fromer*, 125 N. Y. 446 (26 N. E. Rep. 805).

Sec. 575. Partition between life tenants and remaindermen. Indiana Rev. Stat. 1894, § 1200, is as follows: "Any

person holding lands as joint tenants or tenants in common, whether in his own right or as executor or trustee, may compel partition thereof in the manner provided in this act. An administrator or executor may also compel partition as a tenant in common or joint tenant may do whenever, in the discharge of his duties as such, it shall be necessary for him to sell the estate of the decedent therein." Construing and applying this statute in a recent case the court say: "It has been held by this court that the owner of a life estate in an undivided part of land may have partition, or, if that be impracticable, a sale of the property, and the proceeds divided between the life tenant and the several remaindermen, in proportion to their respective interests. *Shaw v. Beers*, 84 Ind. 528. Also, that tenants in common of a life estate may compel partition. *Hawkins v. McDougal*, 125 Ind. 597 (25 N. E. Rep. 818), and cases cited. While it has been uniformly held in this state that remaindermen cannot compel partition—that is, they cannot maintain such an action as plaintiffs—they may be made defendants, and be bound by the decree in partition proceedings. *Swain v. Hardin*, 64 Ind. 85; *Shaw v. Beers*, 84 Ind. 528; *Sullivan v. Sullivan*, 66 N. Y. 37; *Savage v. Savage*, 19 Ore. 112 (23 Pac. Rep. 890; 20 Am. St. Rep. 795); *Lynch v. Leurs*, 30 Ind. 411." *Tower v. Tower*, 141 Ind. 223 (40 N. E. Rep. 747). As to how far a decree of sale in partition is binding upon remaindermen not in being, see *Ballards' Annual*, Vol. 3, § 559.

EPITOME OF CASES.

Sec. 576. As to who may have partition. One who has no interest in real estate cannot maintain an action for the partition thereof. *Dinwiddie v. Smith*, 141 Ind. 818 (40 N. E. Rep. 748). It is held that the grantee of a deed executed for the sole purpose of securing a debt can not maintain an action for partition. *Marx v. La Rocque*, 27 Ore. 45 (39 Pac. Rep. 401). On this point, see *Ballards' Annual*, Vol. 1, § 578. Indiana Rev. Stat. 1894, § 1200, only authorizes partition among persons holding lands as joint tenants or tenants in common. Partition will not be enforced as between parties each of whom owns a distinct portion of a building. *School Corp. v. Russellville Lodge No. 141, F. & A. M.*, 140 Ind. 422 (39 N. E. Rep. 549). On this point, see *Ballards' Annual*, Vol. 2, § 499. In Iowa it is held that after the year for the settlement of the estate has expired, the presumption is that the land of the decedent is not needed for the payment of debts and partition can then be made unless it be shown in defense that there is not enough personal property to pay debts and that the executor still has the equitable right to sell the land

to meet the liabilities of the estate. *Minear v. Hogg*, Ia. (68 N. W. Rep. 444). Massachusetts Pub. Stat., Chap. 178, § 8, authorizing partition suit to be maintained by any person who has an estate in possession but not by one who is only a remainderman or reversioner, is held not to authorize a partition of land where a mortgagee is in exclusive possession having entered for condition broken. *O'Brien v. Bailey*, 163 Mass. 325 (39 N. E. Rep. 1109). In New Jersey it is held that where all the lands of which partition is sought by tenants in remainder of several undivided shares, are held by a single particular estate, partition cannot be had without the consent of the tenant of that particular estate. *Roarty v. Smith*, 58 N. J. Eq. 253 (81 Atl. Rep. 1031). Under the Washington statute it is held that an action for a partition of real estate can be maintained by a tenant in common against a cotenant in possession under a denial of right without a prior action at law for the trial of title. *Chapman v. Allen*, 11 Wash. St. 627 (40 Pac. Rep. 219).

Sec. 577. Parol partition. A parol partition, carried out and followed by actual possession in severalty of the several parcels is valid and will be enforced notwithstanding the statute of frauds on the theory that it has been removed from its operation by part performance. *Whittemore v. Cope*, 11 Utah 344 (40 Pac. Rep. 256); *Tuffree v. Polhemus*, 108 Cal. 670 (41 Pac. Rep. 806); *Casey v. Anderson*, 17 Mont. 176 (42 Pac. Rep. 763). A voluntary partition by tenants in common, where partition could be constrained by legal process, will, unless fraudulent or grossly unequal, be upheld as between the parties thereto and their privies in estate, after long acquiescence by such parties, accompanied with a several possession in conformity to the partition, though the interest of one of the cotenants was covered by and embraced in a homestead duly set apart prior to such partition, and which has not yet terminated. *Blacker v. Dunlop*, 93 Ga. 819 (21 S. E. Rep. 185). A contract for a parol partition of land is indivisible and a decree enforcing the rights of one of the parties thereunder should enforce the contract as to all. *Van Eaton v. Hamlin*, Miss. (16 So. Rep. 594). A parol agreement between devisees as to lands in which they have

no joint interest does not constitute a partition. *Chace v. Gregg*, 88 Tex. 552 (82 S. W. Rep. 520). For cases which depend upon particular facts and illustrate the validity of parol partitions, see *Howell v. Mellon*, 169 Pa. St. 188 (82 Atl. Rep. 450).

Sec. 578. Practice in actions for partition. New parties may be brought in by a cross complainant. *Chalmers v. Trent*, 11 Utah 88 (89 Pac. Rep. 488). The grantees of a cotenant who claim under a deed conveying them a specific parcel of the land should be made parties. *Maverick v. Burney*, 88 Tex. 560 (82 S. W. Rep. 512). Under Mo. Gen. Stat. 1865, c. 152, a husband is not a necessary party to an action for partition of the wife's lands; and under c. 161, § 8, the wife may sue or defend, in such action, by a next friend. *Cochran v. Thomas*, 181 Mo. 258 (38 S. W. Rep. 6). Partition proceedings will not be stayed on the ground of the pendency of a proceeding for an accounting between the parties to determine the amount due each out of the personal estate of the common ancestor. *Pomeroy v. Chandler*, N. J. Eq. (80 Atl. Rep. 1092). The title of one who purchased under a decree in an action between devisees to sell land and divide proceeds because the land was not divisible, will not be affected by the failure of the court to take proof on the question of the divisibility of the land. *Perkins v. McCarley*, Ky. (28 S. W. Rep. 867).

Under the Maryland statute, § 116 of Art. 16 of the Code, which provides for the partition and sale of real estate, in which some of the parties having interest are adults and some are infants, it is necessary that the court should retain the bill in order that a guardian *ad litem* may be appointed. Where the guardian of the infants joins in the bill, upon proof that the property is not susceptible of partition without loss or injury, the complainants are entitled to a decree for its sale. *Koontz v. Koontz*, 79 Md. 857 (82 Atl. Rep. 1054). The Ky. Code, § 490, which provides that a vested estate in real property owned by two or more persons jointly may be sold, though one of the owners be an infant, if the estate be in possession, and the property cannot be divided without materially impairing its value, does not authorize the sale of a tract of land, a part of which is

owned by a widow in fee, part by minor children subject to the widow's dower, and the rest by the children in fee, though made at the instance of the widow's creditors. *Kelly v. Muir*, Ky. (80 S. W. Rep. 658). A suit to determine title and for partition brought by one cotenant against persons claiming title under a foreclosure sale of the premises, and his other cotenants, no controversy being raised as to the right of partition, is not an action for partition within the meaning of N. C. Rev. Stat. 1898, § 2548. *Williams v. Washington*, 48 S. C. 855 (21 S. E. Rep. 259).

Sec. 579. Improvements made and taxes paid. In partition, the part improved, if it can be done without injury to others, should be assigned to the improver; but, where this cannot be done, the cost of improvement cannot be charged to him to whom it goes. Where, however, the property is not susceptible of partition, and must be sold to divide the proceeds, the coparcener who made repairs and permanent improvements shall receive out of the proceeds that amount by which the property, at the date of sale remains enhanced in value from the improvements, not their original cost. *Ward v. Ward's Heirs*, 40 W. Va. 611 (21 S. E. Rep. 746; 29 L. R. A. 449). Upon partition a cotenant who has advanced money to pay taxes is entitled to be reimbursed for the same. *Flynn v. O'Malley*, N. J. Eq. (88 Atl. Rep. 402).

Sec. 580. Trial of title in partition. A partition between joint owners does not confer title upon either, but has the effect only to dissolve the tenancy in common, and leave the title as it was before, except to locate such rights as the parties may have, respectively, in the distinct parts of the premises, and to extinguish such rights in all other portions of that property. *Chace v. Gregg*, 88 Tex. 552 (82 S. W. Rep. 520). Citing, *Tabler v. Wiseman*, 2 Ohio St. 211; *Yancey v. Radford*, 86 Va. 642 (10 S. E. Rep. 912); *Carpenter v. Schermerhorn*, 2 Bard. Ch. 322; *Goundie v. Water Co.*, 7 Pa. St. 288; *Arnold v. Cauble*, 49 Tex. 530; *Davis v. Agnew*, 67 Tex. 213 (2 S. W. Rep. 43, 376). Conflicting claims to land may be adjudicated in an action of partition. *Kromer v. Friday*, 10 Wash. St. 621 (39 Pac. Rep. 229; 32 L. R. A. 671). In an action for the partition of lands, if the defendant

denies the plaintiff's title and claims title in himself, the burden of proof is on the plaintiff to establish his title the same as in ejectment. *Huneycutt v. Brooks*, 116 N. C. 788 (21 S. E. Rep. 558). In an action of partition, where the title to land and the right to divide and dispose of the same in severalty are put in issue or might have been litigated therein, the judgment rendered is binding upon the parties to the proceeding and those holding under them, as to such issues. In the absence of the testimony, or of the special finding upon a material question in the case, it will be presumed that the facts disclosed in evidence were such as to support the general finding and judgment of the court. *Pennell v. Felch*, 55 Kan. 78 (89 Pac. Rep. 1028). Under Louisiana Rev. Civ. Code, Arts. 1880 and 2286, it is held that a suit for partition calls on defendants to urge all defenses on which they propose to rely, and the decree for the partition concludes them from any attack on the plaintiff's title, the basis of their demand for the partition; hence, on injunction by defendants to stop the execution of the partition decree, the injunction obtained on the ground that the plaintiff had no title to demand the partition will be dissolved. *Choppin v. Union Nat. Bank*, 47 La. 660 (17 So. Rep. 201). The Miss. Code, 1892, § 8101, provides for the determination of questions of title in actions of partition and it is held that as to a necessary party to the action a decree of partition is conclusive as to all claims such party then had to the common estate. *Foster v. Jones*, Miss. (17 So. Rep. 898). The Virginia Code, 1887, § 2562, authorizes a court of equity in a partition suit to settle all questions of law which may arise in the case. It is held that this statute is not an improper abridgment of the right of trial by jury and that it applies to a case where a defendant in partition is in possession of the land asserting an adverse claim and denying the rights of the plaintiff to partition. *Pillow v. Southwest Va. Imp. Co.* Va. (28 S. E. Rep. 82).

Sec. 581. Partition sales. Under a statute authorizing a sale in partition when it would be for the advantage of the parties it is held that where the value of the land consisted largely in its minerals of unknown quantity and location, it was proper to decree a sale. *Wilson v. Bogle*, 95

Tenn. 290 (32 S. W. Rep. 886). The court say: "It is true that each tenant in common of land has a right to a partition of the premises, except where such partition is impracticable, or where, from the situation of the premises, a sale would be manifestly advantageous to all the parties interested." Cal. Code Civ. Proc., § 752, is as follows: "When several co-tenants hold and are in possession of real property as parceners, joint tenants, or tenants in common, in which one or more of them have an estate of inheritance, or for life or lives, or for years, an action may be brought by one or more of such persons for a partition thereof according to the respective rights of the persons interested therein, and for a sale of such property or a part thereof, if it appear that a partition cannot be made without great prejudice to the owners." Construing and applying this statute it is held that in partition by an owner of an undivided interest in an estate for years against the owner of other undivided interests, one of whom is also the sole owner of the reversion, it is not error to order a sale of the estate for years without ordering that the reversion be sold. *Jameson v. Hayward*, 106 Cal. 682 (39 Pac. Rep. 1078; 46 Am. St. Rep. 268). N. C. St., Acts 1887, Ch. 214, which provides that the existence of a life estate shall not bar a sale for partition, is held not to impair the rights of a remainderman whose interest vested prior to the passage of the act. *Gillespie v. Allison*, 115 N. C. 542 (20 S. E. Rep. 627). A sale for partition will not be set aside for mere inadequacy of price no fraud being shown. *Carver v. Spence*, 67 Vt. 563 (32 Atl. Rep. 493).

PARTNERSHIP REAL ESTATE.

EPITOME OF CASES.

Sec. 582. As to what constitutes partnership real estate. Where one partner agrees to contribute, as his capital to the business, certain lands, "it being understood and agreed that said land is the sole property" of said partner, such

agreement gives to the partnership the use of the land but does not pass to it the equitable title. *Richmond v. Voorhees*, 10 Wash. St. 816 (38 Pac. Rep. 1014). Under the Nevada statute there can be no partnership in a mining claim by virtue of a parol agreement unless partnership capital was used in its location. *Craw v. Wilson*, Nev. (40 Pac. Rep. 1076). It is held that where land was bought with individual funds and recorded in the name of a member of a firm and was not used in the firm's business, the fact that it was entered in the firm books and treated by the partners themselves as firm property, will not render it such as between individual and firm creditors; but where the land so bought and recorded was necessary for the firm business and was so used as to give notice to the individual creditors that it was treated as partnership realty and was also entered in the firm books as part of the common stock, then as between individual and firm creditors it will be treated as firm property. *National Union Bank v. Nat. Mechanics' Bank*, 80 Md. 871 (30 Atl. Rep. 918; 45 Am. St. Rep. 350; 27 L. R. A. 476). An agreement between two persons to jointly buy and sell a piece of land and divide the profits does not constitute a partnership. *Gottschalk v. Smith*, 156 Ill. 877 (40 N. E. Rep. 937). For cases which depend upon particular facts determining whether or not land is partnership realty, see *Lindsay v. Race*, 103 Mich. 28 (61 N. W. Rep. 271); *Hake v. Coach*, Mich. (65 N. W. Rep. 209); *Booher v. Perrill*, 140 Ind. 529 (40 N. E. Rep. 36).

Sec. 583. Miscellaneous notes. As between the partners and those dealing with them with knowledge of the facts, partnership real estate will be treated as personal property. *Moore v. Wood*, 171 Pa. St. 365 (38 Atl. Rep. 63). On this point see Vol. 2, § 504. It is held that the statute relating to partnership settlements does not terminate the common law rights of a surviving partner until the statutory proceedings have been inaugurated; and where the debts of the firm exceed the value of its property, the surviving partner by paying such debts and taking possession of the firm real estate to reimburse himself therefor acquires an equitable title which will be protected. *Dyer v. Morse*, 10 Wash. St. 492 (39 Pac.

Rep. 188; 28 L. R. A. 89). Real estate belonging to a firm, not engaged in the sale of real estate, cannot be conveyed or incumbered by a mortgage made by one partner, unless such power is expressly conferred upon him or the title is vested in him. *Carr v. Hertz*, N. J. Eq. (88 Atl. Rep. 194). Where one partner purchases real estate with partnership funds, and takes the title in his own name, he will be deemed a trustee holding the title for the benefit of the partnership. Where there are more than two copartners, one of them cannot convey or release to another partner valuable partnership property, without the knowledge or consent of the other partners. *Hardin v. Jamison*, 60 Minn. 848 (62 N. W. Rep. 894).

PARTY WALLS.

EPITOME OF CASES.

Sec. 584. As to when party wall agreements run with the land. Where one of two owners of adjoining lots erects a wall upon the dividing line, one-half of which rests upon each lot, under an agreement which provides that the wall may be so erected and that the party erecting it shall continue the sole owner thereof until the other party or his assigns shall use the same as a party wall, at which time the party erecting the wall is to be paid for one-half thereof, and that such agreement should be perpetual and be construed as a covenant running with the land, it was held, by a divided court, that upon the erection of the second building and the use of such wall, the right of the party who erected the first building to be paid for one-half of the wall becomes a lien upon the other lot, and that the party who erected the second building became personally liable, but that the personal liability did not extend to his grantees. *First Nat. Bank v. Security Bank*, 61 Minn. 25 (63 N. W. Rep. 264).

Sec. 585. Miscellaneous notes. Where a wall on a dividing line projects beyond the line of the owner, equity

will not enjoin the other party from its use as a party wall. *Bank of Escondido v. Thomas*, Cal. (41 Pac. Rep. 462). On construction of statutes in respect to party walls, a case with annotations, see Vol. 1, §§ 839-842. See also Vol. 8, § 572. It is held that where one intends to construct a wall within the line of his own lot but by mistake of a surveyor extends the foundation one and one-half inches on to the adjoining lot, he does not thereby make it a party wall. *Pile v. Pedrick*, 167 Pa. St. 296 (81 Atl. Rep. 646, 647; 46 Am. St. Rep. 677). Under the Pennsylvania statute of Feb. 24, 1721, as modified by acts April 27, 1852, Feb. 2, 1854, May 7, 1855, and April 11, 1856, it is held that a builder who erects a party wall of greater thickness than is specified in his building permit, cannot place one-half thereof on the adjoining lot, even though the encroachment be within the maximum limit. *Kirby v. Fitzpatrick*, 168 Pa. St. 484 (82 Atl. Rep. 58).

PLATS AND SURVEYS.

EPITOME OF CASES.

Sec. 586. Miscellaneous notes. A plat is not necessarily inadmissible in evidence because not made by a civil engineer. *Gustin v. Jose*, 11 Wash. St. 848 (89 Pac. Rep. 687). Where municipal authorities have power to vacate streets the official adoption of a map by them which is declared to be a plat of a certain part of a city with respect to the location and establishment of streets operates as a discontinuance and abandonment of streets formerly existing which do not appear on such map. *City and Co. of San Francisco v. Burr*, 108 Cal. 406 (41 Pac. Rep. 482). "Where the plat of a town site has been lost, a deed of one who, at the time it was executed, owned property within and without the tract alleged to have been covered by the plat, and which conveys land outside of the tract, describing the land by bounding it by a portion of the town-site tract, is admissible to show the location of the land covered by the plat, in order to defeat the

title of one claiming under such former owner." *Sperry v. Wesco*, 26 Ore. 488 (38 Pac. Rep. 628). As to duties and liabilities of a surveyor employed to locate the boundaries of a lot with respect to notifying the owner of encroachments on the lot by buildings belonging to another, see *Halsey v. Hobbs*, Ky. (32 S. W. Rep. 415). In locating the northwest corner of a section of which the northeast corner can be located, it is error, instead of merely following the calls of the division survey of the township, to start from a subsection corner in an adjoining township subdivided under a different survey, and thence run a mile and a half, only connecting the subdivision surveys of the two townships by assuming that their section corner stones on the township line coincide. *O'Hara v. O'Brien*, 107 Cal. 809 (40 Pac. Rep. 428). U. S. Rev. Stat., §§ 2895, 2896, construed and applied—survey of townships into sections. *Tolleston Club v. State*, 141 Ind. 197 (40 N. E. Rep. 690). Where one contemplating the platting of his land as a town site employs the county surveyor to make a survey of it, and a plat is made in accordance with the survey, and the county surveyor attaches to the plat his official certificate in the form prescribed by statute, the survey is an official one, and the record of it, including the "field notes and calculations," is official and should be transmitted by the county surveyor to his successor in office. Minn. Gen. Stat. 1894, §§ 831, 832, 2207, 5758, applied. *State v. Patton*, 62 Minn. 388 (64 N. W. Rep. 922). "Where the south line of the S. survey was called for as the north line of the M., and every corner, course and distance of that line was thus adopted, and the location of the line was undisputed, and there were no marks special to the M. to stop it short of its call, the M. could not, under the rule that marks on one of a block of tracts are competent to locate another of the block, be placed 50 rods south of the S., by running the official courses and distances of the M.'s adjoiner on the east, which was surveyed the same day, and was in the same block of tracts, from an established original corner on the north line of the adjoiner, merely because no marks remained, or could be established, to stop the running of the adjoiner's courses short of their official distances." *Fisher v. Kaufman*, 170 Pa. 444 (38 Atl. Rep. 137).

POSSESSION.

EPITOME OF CASES.

Sec. 587. As to what constitutes possession of land. In a recent case it is said: "Although a trespasser who goes upon the lands of another without claim or color of title cannot acquire a right or title to crops or timber by severing and removing the same from the freehold, and is liable to the owner in an action of detinue or trover, yet if the owner has notice that the trespasser is upon the premises, exercising acts of ownership, such as cultivating the land, or severing and removing the timber, and acquiesces therein, or if, upon notice by the owner to the intruder to desist, the demand is refused, and he remains upon the premises, and continues to exercise acts of dominion and ownership, such possession becomes actual, and adverse to that of the owner. The owner's possession becomes divested, and his right is in entry only." *Stewart v. Tucker*, 106 Ala. 819 (17 So. Rep. 885). Where a statute requires an action to be commenced against a party in possession of land by the service of process upon such party, by possession is meant not a mere occupant who is the agent or servant of another, but some person in possession exercising acts of ownership and claiming title or right to the possession in himself. *Lattie-Morrison v. Holladay*, 27 Ore. 175 (39 Pac. Rep. 1100). Going upon premises without right and putting a foundation under a house is not obtaining possession of the house, and possession obtained by trespass cannot be made the basis of a legal right. *Ellsworth v. McDowell*, 44 Neb. 707 (62 N. W. Rep. 1082). Possession of land is denoted by the exercise of acts of dominion over it, in making the ordinary use and taking the ordinary profits of which it is susceptible in its present state, such acts to be so repeated as to show that they are done in the character of owner, and

not of an occasional trespasser. *Woodford v. Alexander*, 85 Fla. 333 (17 So. Rep. 658).

Sec. 588. Possession as notice. One who purchases land occupied by another than the grantor is chargeable with notice of the rights of the occupant. Possession of land by a contract purchaser is constructive notice of his rights. *Corey v. Smalley*, Mich. (64 N. W. Rep. 13). In a recent case the supreme court of Virginia say: "This is the established doctrine both in England and in this country." *Chapman v. Chapman*, 91 Va. 397 (21 S. E. Rep. 813; 50 Am. St. Rep. 846). Possession is notice of whatever title the possessor may have. *Krueger v. Walker*, Ia. (63 N. W. Rep. 320); *Miner v. Wilson*, Mich. (64 N. W. Rep. 874); *Austin v. Pulschen*, Cal. (39 Pac. Rep. 799); *Reynolds v. Kirk*, 105 Ala. 446 (17 So. Rep. 95). In order that possession shall be constructive notice of a secret equity, it must be in a measure exclusive possession. *Munn v. Achey*, Ala. (18 So. Rep. 299). The possession of a tenant of a grantor is not notice of the claim of a grantee who claims under an unrecorded deed against a subsequent *bona fide* purchaser of the premises. *Bynum v. Gold*, 106 Ala. 427 (17 So. Rep. 667). Notice of one's possession under an unrecorded instrument, such as the statute requires to be recorded in order to affect purchasers, does not charge a purchaser with notice of the terms of such instrument. *Toupin v. Peabody*, 162 Mass. 473 (89 N. E. Rep. 280). Proof of possession under a void deed is not evidence of title. *Baird v. Law*, Ia. (61 N. W. Rep. 1086).

POWER OF ATTORNEY.

EPITOME OF CASES.

Sec. 589. Authority conferred by. A power of attorney executed jointly by a husband and wife authorizing him to convey lands to which "we, or either of us, are seised," a

stipulation that a surplus, after the payment of certain debts, shall be paid to the wife "in satisfaction of her dower or rights" in the land, empowers the attorney to bar the wife's dower and his deed need not contain an express recital to that effect. *Bertschy v. Bank of Sheboygan*, 89 Wis. 478 (61 N. W. Rep. 1115). A power of attorney, executed by the plaintiff and his wife, authorizing N., as their attorney, to sell and convey any land which "we may hereafter acquire or become seised of, or in which we may hereafter be in any way interested, under the act of congress approved March 8, 1878, granting additional lands as homesteads to honorably discharged soldiers," etc., was held to authorize N. to sell and convey lands afterwards entered by the plaintiff, under the act of congress referred to, as a "soldier's additional homestead." *Tuman v. Pillsbury*, Minn. (68 N. W. Rep. 104). A power to sell and convey does not authorize the execution of a mortgage. *Salem Natl. Bk. v. White*, 159 Ill. 136 (42 N. E. Rep. 812). The court say: "In case of an ordinary power of attorney to sell land and make deeds to the land sold, the power to sell conveys no implied authority to mortgage. Mechem, Ag. § 828; 1 Am. & Eng. Enc. Law, p. 860; *Jeffrey v. Hursh*, 49 Mich. 81 (12 N. W. Rep. 898). In *Jeffrey v. Hursh*, *supra*, Mr. Justice Cooley says: 'The principal determines for himself what authority he will confer upon his agent, and there is no implication from him authorizing a sale of his land, that he intends that his agent may, at discretion, charge him with the responsibilities and duties of a mortgagor,' and cites many cases in support of this position." The power of an attorney which authorizes one to sell his principal's land "for such sum or price and on such terms as to him shall seem meet" does not authorize the agent to sell for anything else than money. *Paul v. Grimm*, 165 Pa. St. 139 (30 Atl. Rep. 721).

Sec. 590. Miscellaneous notes. A wife may appoint her husband her attorney in fact to execute a note for her and secure the same by a mortgage on her land. *Richmond v. Vorhees*, 10 Wash. St. 816 (38 Pac. Rep. 1014). A conveyance in his own name by one holding a power of attorney from another does not affect the latter's title. *Salem Nat. Bank v. White*,

III. (42 N. E. Rep. 312). Unless specifically authorized to do so, an attorney in fact, has no authority to sell his principal's land for anything except money; and if he accepts other property which proves worthless he is liable to his principal for the purchase price. *Paul v. Grimm*, 165 Pa. St. 139 (30 Atl. Rep. 721). The rule that after a long lapse of time, a power of attorney will be presumed to have been given where a deed purports to have been executed under a power will not prevail where there has been no claim of title asserted under the deed for more than twenty-five years. *Baldwin v. Goldfrank*, 88 Tex. 249 (81 S. W. Rep. 1064).

STATUTORY PROVISIONS.

Sec. 591. Alabama. "Powers of attorney or other instruments conferring authority to convey property may be proved or acknowledged in the same manner, and must be received as evidence to the same extent as conveyances." Code, § 1801. The general statute concerning "Powers" does not apply to powers of attorney. Code, § 1867.

Sec. 592. Arkansas. "Every letter of attorney containing a power to convey any real estate as agent or attorney for the owner thereof, or execute as agent or attorney for another any deed or instrument in writing that shall convey any real estate, or whereby any real estate shall be affected in law or equity, shall be acknowledged or proven and certified and recorded with any deed that such agent or attorney shall make in virtue of such letter of attorney." Digest of Stat. (1884), § 661. Revocation may be executed by maker of power or his legal representatives in same manner as the power and should be filed in county where the power was intended to operate, from the time of which filing the power shall be deemed revoked. *Id.*, § 663. Powers of attorney are to be proven and acknowledged the same as deeds. Sandel & Hill's Dig., § 719. A married woman may execute power of attorney and convey land in that manner the same as if she were unmarried. Acts 1895, p. 58.

A married woman cannot execute a power of attorney except in the manner prescribed for the execution of deeds by her where the statute or law prescribes the manner of executing deeds. *McDaniel v. Grace*, 15 Ark. 465. In this case the court doubts whether, in the absence of a statute so authorizing, a wife can appoint her husband her attorney in fact to convey land. Where a deed is made under a letter of attorney it must be recorded with the deed. *McDaniel v. Grace*, 15 Ark. 480. *Elliott v. Pearce*, 20 Ark. 515. *Cornall v. Duval*, 22 Ark. 136. Powers of attorney must be recorded or deeds executed under them will not operate as notice to subsequent purchasers from party executing the power. *Jones v. Green*, 41 Ark. 363.

Sec. 593: California. "When an attorney in fact executes an instrument transferring an estate in real property, he must subscribe the name of his principal to it, and his own name as attorney in fact." Deering's Civ. Code, § 1095.

"The certificate of acknowledgment by an attorney in fact must be substantially in the following form:"

"State of..... } ss.
"County of..... }

"On this.....day of....., in the year....., before me [here insert the name and quality of the officer] personally appeared, known to me [or proved to me on the oath of.....] to be the person whose name is subscribed to the within instrument as the attorney in fact of...., and acknowledged to me that he subscribed the name of.....thereto as principal, and his own name as attorney in fact." Id. § 1192.

"No instrument containing a power to convey or execute instruments affecting real property, which has been recorded, is revoked by any act of the party by whom it was executed, unless the instrument containing such revocation is also acknowledged or proved, certified and recorded, in the same office in which the instrument containing the power was recorded." Id. § 1216.

"A power of attorney to execute a mortgage must be in writing, subscribed, acknowledged or proved, certified and recorded in like manner as powers of attorney for grants of real property." Id. § 2933.

"A married woman may make, execute, and revoke powers of attorney for the sale, conveyance, or encumbrance of her real or personal estate, which shall have the same effect as if she were unmarried, and may be acknowledged in the same manner as a grant of real property." [Approved Mar. 9, 1895.] Supp. to Cal. Codes, 1895, § 1094.

Prior to the act of April 3, 1863, a married woman was incompetent to execute a power of attorney. *Dow v. Gould & C. G. & S. M. Co.*, 31 Cal. 629; and see *Mott v. Smith*, 16 Cal. 533, and *Dentzel v. Waldie*, 30 Cal. 138. But that act was retroactive in its effect, validating such powers of attorney theretofore made as had been joined in by the husband. *Dow v. Gould & C. G. & S. M. Co.*, 31 Cal. 629. The husband may be the attorney in fact, and through him the wife may make a valid executory contract affecting her separate estate. *Racouillat v. Sansevain*, 32 Cal. 376. A joint power of attorney from the husband and wife is effectual to authorize the attorney in fact to execute a lease of the separate estate of the wife. *Douglas v. Fulda*, 50 Cal. 77. A deed executed by an attorney in fact must be executed in the principal's name, in order to make it convey his property. *Fisher v. Salmon*, 1 Cal. 413 (54 Am. Dec. 297); *Echols v. Cheney*, 28 Cal. 157; *Morrison v. Bowman*, 29 Cal. 337; *Love v. Sierra Nevada etc. Co.*, 32 Cal. 639 (91 Am. Dec. 602). A deed made under a general power of attorney authorizing the attorney "to make and execute conveyances," the purchase money being received by the principal, cannot be assailed for the want of authority to execute it. *Hunter v. Watson*, 12 Cal. 363 (73 Am. Dec. 543). The fact that the execution was in the

presence of the principal must be affirmatively established by the party who relies upon it as an excuse for the want of a power in writing. *Videau v. Griffin*, 21 Cal. 389.

Sec. 594. Colorado. "In order that all conveyances which are executed by any attorney in fact may be seen to be executed with the assent of the grantor, the power of attorney of the attorney in fact, duly proved or acknowledged, shall be (if it has not been) recorded in the same office in which the conveyances themselves are required to be recorded." Mills' Ann. Stat., § 438. Powers of attorney are acknowledged and proved in the same manner as deeds. Mills' Ann. Stat., § 445.

As to certificate of acknowledgment of power of attorney, see, *Holladay v. Daily*, 1 Colo. 463. To convey the husband's real property the wife need not join in the power of attorney and when her name is in the power of attorney the attorney will make his deed as though her name were not there. *Holladay v. Daily*, 1 Col. 463. Affirmed. 19 Wall 606. To require a wife's name to a deed of separate property of husband, holds out false promises and is against public policy. *Holladay v. Daily*, 1 Colo. 463. A power of attorney from a husband and wife to convey their property will apply to her property alone, if they hold no property jointly. *Clayton v. Spencer*, 2 Colo. 378, 381. A power of attorney not under a seal will pass an equitable but not legal title, and will save a contract from falling within the statute of frauds. *Tilton v. Cofield*, 2 Colo. 404, 410.

Sec. 595. Connecticut. Powers of attorney are to be executed the same as deeds; and when executed out of the state to convey lands within the state may be executed according to the laws of the state where executed. Gen. Stat., §§ 2954, 2956. Where a conveyance is executed by virtue of a power of attorney it shall be recorded with the deed. Id., § 2961.

Sec. 596. Delaware. A power of attorney is executed the same as a deed, Laws of Delaware, Ch. 83, § 11; and when properly executed and recorded the attorney may execute a deed for his principal; and an authority to sell or dispose of premises, if not restrained, shall extend to the execution of a deed therefor. Id., § 12. A married woman may execute a letter of attorney the same as if she were *sole*. Id., § 13. The power must be recorded in the county where the lands it affects are situated. Id., § 14.

Sec. 597. Florida. A deed executed in virtue of a power of attorney is not "good or effectual in law or in equity against creditors or subsequent purchasers for a valuable consideration and without notice, unless the power of attorney be recorded before the accruing of the right of such creditor or subsequent purchaser." Rev. Stat., § 1792. A married woman's power of attorney must be joined in by her husband and executed the same as a conveyance of her separate real estate. Id., § 1967. For statute validating conveyances of married women by power of attorney. See Id., § 1970.

Sec. 598. Georgia. "The act creating the agency must be executed with the same formality (and need have no more) as the law prescribes for the execution of the act for which the agency is created." Code, § 2182.

Sec. 599. Idaho. "When an attorney in fact executes an instrument transferring an estate in real property he must subscribe the name of his principal to it, and his own name as attorney in fact." Rev. Stat., § 2925.

A power of attorney to execute a mortgage must be executed in the same manner as a power of attorney to convey. Rev. Stat., § 3357. A power of attorney can only be revoked by recording in the office where it is recorded a properly executed revocation. Id., § 3003. A married woman may execute a power of attorney her husband joining with her and where her husband has not been a *bona fide* resident of the state within one year she may execute such power alone. Id., § 2924.

Sec. 600. Illinois. Under Pub. Laws Ill. 1869, p. 359, § 1. providing that a wife, joining with her husband in the execution of any deed, power of attorney, etc., relating to the sale or conveyance of land, shall be bound and concluded by the same in respect of her dower in such estate, where the wife joins with her husband in the execution of a power of attorney, the conveyance made thereunder bars her dower. *Hull v. Glover*, 126 Ill. 122 (18 N. E. Rep. 198). Under Rev. Stat. Ill. 1845, Ch. 25, Div. 1, §§ 17-21, which provided for the recording of plats acknowledged by the owner of the land, the recording of a plat acknowledged by the attorney in fact of such owner does not operate as a statutory dedication of the streets. *Earll v. City of Chicago*, 136 Ill. 277 (26 N. E. Rep. 370). A power of attorney may be acknowledged before a notary public. *Holbrook v. Nichol*, 36 Ill. 161. A mere naked power of attorney is revoked by the death of the principal. *Gorher v. Myers*, 32 Ill. App. 175.

Sec. 601. Indiana. "No person or persons shall be authorized to sell, release or convey real estate or any interest therein, as attorney-in-fact of another, nor to make any deed, mortgage, or other paper entitled to record as such attorney-in-fact, or to transfer, assign, release, or satisfy in whole or in part any mortgage, lease, mechanic's lien, or any other instrument which is of record in the recorder's office, involving the signing of the name or names of the person, persons, or corporation executing the same, or to whom the same is executed, without being authorized so to do by an instrument in writing duly signed and acknowledged by the person, persons, or corporation granting such authority particularly setting forth and specifying the power of authority given, granted and conferred to be known as a [power] power of attorney, which shall be duly recorded in the office of the recorder of the county or counties where such business is to be transacted, or acts authorized to be executed, and shall by the recorder be recorded in the miscellaneous records of his office, and when after such record, the party shall do, execute, or perform any act, power to do which is conferred by such power of attorney, the party

conferring the power shall be bound thereby as to all such acts done and performed prior to notice of revoking of such authority, which notice may be given by a memorandum thereof entered on the margin of the record of such power of attorney, duly attested by the recorder, or by copy of a duly acknowledged memorandum entered and attested as aforesaid." Rev. Stat., § 3337 (Ballards' Ind. Real Est. Stat., § 78).

"It is hereby made the duty of the county recorder to refuse to receive for record any deed or mortgage which appears upon the face to be executed by an attorney-in-fact, or to permit any transfer, assignment, release, or satisfaction in whole or in part of any mortgage, lease, easement, mechanic's lien, or other instrument of record in his office, by any person claiming to be an attorney in fact of the party in interest, until the letter creating such power, duly executed according to law, shall be first placed of record in his office as provided in § 1 of this act." Rev. Stat., § 3338 (Ballards' Ind. Real Est. Stats., § 79).

A power of attorney is valid as between the parties, and for all ordinary purposes, without being recorded. Its recording is only material when notice to third parties is requisite. *Caley v. Morgan*, 114 Ind. 350 (16 N. E. Rep. 790).

Sec. 602. Iowa. "The execution of any deed, mortgage, or other instrument in writing, executed by an attorney in fact, may be acknowledged by the attorney executing the same." Code, § 1962. A power of attorney can only be revoked by an instrument duly executed and recorded in the same office in which the instrument containing the power is recorded. Miller's Code, § 1969. A power of attorney must be recorded. Id., § 1941.

Sec. 603. Kansas. "Every letter of attorney, or other instrument, containing a power to convey real estate, as agent or attorney for the owner thereof, or to execute, as agent or attorney for another, any instrument in writing conveying real estate, or whereby real estate may be affected, shall be acknowledged or proved, and certified and recorded, as other instruments in writing, conveying or affecting real estate, are required to be acknowledged or proved and certified and recorded." Gen. Stat., § 1131.

"All letters of attorney authorizing the execution of any deed, mortgage or other instrument of writing, for the sale, conveyance or incumbrance of any lands, tenements or hereditaments in this state, shall be recorded in the office of the register of deeds of the county in which such lands, tenements or hereditaments are situated, previous to such sale, or the execution of such deed, mortgage or other instrument of writing authorized by such power of attorney." Id., § 1132.

"No such letter of attorney or other instrument, certified and recorded in the manner prescribed in the preceding section, shall be deemed to be revoked by any act of the party by whom it was executed, until the instrument containing such revocation shall be deposited for record in the same office in which the instrument containing the power is recorded." Id., § 1133.

Sec. 604. Kentucky. "Powers of attorney to convey real or personal property may be acknowledged, proved, and recorded in the proper office, in the manner prescribed for recording conveyances. If the conveyance, made under a power, is required by law to be recorded, or lodged for record, to make the same valid against creditors and purchasers, then the power must be lodged or recorded in like manner." Gen. Stat., Ch. 24, § 13; Ballards' Real Estate Statutes of Kentucky, § 122. Non-resident married women may convey by power of attorney executed and acknowledged as deeds by married women are required to be. Gen. Stat., Ch. 24, § 36; Ballards' Ky. Real Est. Stat., § 115.

Sec. 605. Louisiana. "A power of attorney may be given, either by a public act or by a writing under private signature, even by letter." Rev. Code, Art. 2992.

"If it be necessary to alienate or give a mortgage, or do any other act of ownership, the power must be express." Id., Art. 2996.

"Thus the power must be express and special for the following purposes: To sell or to buy; to incumber or hypothecate; to accept or reject a succession; to contract a loan or acknowledge a debt; to draw or indorse bills of exchange or promissory notes; to compromise or refer a matter to arbitration; to make a transaction in matters of litigation; and in general where things to be done are not merely acts of administration, or such as facilitate such acts." Id., Art. 2997.

The marriage of a female vacates a power of attorney given by her. *Dackhan v. Potter*, 27 An. 73. A power of attorney sufficiently comprehensive to authorize the agent to manage a plantation, and disburse the proceeds of its crops, will justify the factor who sells the crops to pay out their proceeds on the orders of the agent. *Sentell & Co. v. Kennedy*, 29 An. 679. A power of attorney authorizing an agent to sell real estate need not be by authentic act. It is only necessary that it be in writing and properly attested. *Smith v. Kinney*, 30 An. 332. A mortgage made by an alleged agent cannot be enforced until it is proven that he was specially authorized to make the mortgage. *Nugent v. Stark*, 30 An. 492.

Sec. 606. Maryland. "Every power of attorney authorizing an agent or attorney to sell and convey any real estate, shall be attested and acknowledged in the same manner as a deed, and recorded with the deed executed in pursuance of such power of attorney; but a corporation shall have power to appoint an attorney for the same purposes by its corporate seal." Pub. Gen. Laws, Art. 21, § 25.

"Such power of attorney shall be deemed to be revoked when the instrument containing the revocation is recorded in the office in which the deed should be properly recorded." Id., Art. 21, § 26.

"Any person executing a deed conveying real estate, as agent or attorney for another, shall describe himself in and sign the deed as agent or attorney." Id., Art. 21, § 27.

A power of attorney shall be executed the same as conveyance of land. Pub. Gen. Laws, Art. 10, § 28. Transactions with an attorney in

fact after the death of the principal made in good faith by one having no knowledge of such death, are valid and enforceable. *Id.*, Ch. 10, § 25.

A deed professing to be made under and by virtue of powers of attorney, and signed by the grantor as attorney, is invalid and inadmissible as evidence of title in the grantee, the powers of attorney not being produced, and it not appearing that they were attested and acknowledged in the same manner as the deed, and recorded with the deed executed in pursuance of such powers of attorney. *Citizens Fire Ins. Co. v. Doll*, 35 Md. 89 (6 Am. Rep. 360). The power of attorney may be recorded either at or before the recording of the deed; and the recording of a power to sell real estate among the land records was held a sufficient compliance with the statute. The terms "with the deed," employed in the statute, means upon the proper records of the city or county where the deed is recorded. *Rooenthal v. Ruffin*, 60 Md. 324.

Sec. 607. Massachusetts. "The provisions of the law concerning the acknowledgment and recording of deeds shall apply to letters of attorney for the conveyance of real estate." Pub. Stat., Ch. 120, § 14.

"A deed, executed and delivered by the person or by the attorney of the person having authority therefor, shall be sufficient, without any other act or ceremony, to convey real estate." *Id.*, Ch. 120, § 1.

Prior to Stat. 1849, Ch. 205, powers of attorney were not required to be acknowledged and recorded. *Valentine v. Piper*, 22 Pick. 85 (33 Am. Dec. 715).

Sec. 608. Michigan. "No letter of attorney, or other instrument so recorded, shall be deemed to be revoked by any act of the party by whom it was executed, unless the instrument containing such revocation be also recorded in the same office in which the instrument containing the power was recorded." How. Ann. Stat., § 5692.

A letter of attorney when properly acknowledged or proved may be recorded although the general statute regulating the execution and recording of deeds is not made expressly applicable to powers of attorney; and the record of a power of attorney or a duly certified copy thereof is evidence. *Id.*, §§ 5690, 5691. Section 5690 authorizes powers of attorney to be recorded among the records of deeds. *Morse v. Hewett*, 23 Mich. 488. For "an act to confirm the record of letters of attorney in certain cases," see Act No. 191, Apr. 17, 1871, p. 320.

Sec. 609. Minnesota. "No letter of attorney or other instrument so recorded shall be deemed to be revoked by any act of the party by whom it was executed, unless the instrument containing such revocation is also recorded in the same office in which the instrument containing the power was recorded." Gen. Stat. 1894, § 4188.

A power of attorney does not come within the meaning of Statutes 1894, § 4185, defining "conveyances," but it may be recorded when properly acknowledged. *Id.*, § 4186. The general statute on "Powers," does not apply to simple powers of attorney. *Id.*, § 4360. For act validating

conveyances executed under power of attorney executed in blank, see *Id.*, § 4203. For statute legalizing defective powers of attorney and conveyance thereunder, see Minn. Stat. 1891, §§ 4159-4163. Same as to conveyances by married women under a power of attorney prior to 1893, Gen. Laws 1895, p. 498. A foreign executor, administrator or guardian may act and convey real estate by power of attorney. Gen. Laws 1895, p. 223; Statutes 1894, §§ 4622, 4717. For statute legalizing certain conveyances made under power of attorney, see, Gen. Laws, 1891, p. 123.

Sec. 610. Mississippi. "All letters of attorney intended to be used in this state may be acknowledged or proved as conveyances of land are required to be, and, when so acknowledged or proved, may be recorded in like manner; and copies thereof, duly certified, shall be admitted in evidence, without accounting for the non-production of the original." Code, § 193.

"Conveyances of land, or contracts relating thereto, executed by an attorney in fact for his principal, and duly acknowledged or proved, shall have the same force and effect as if executed and acknowledged by the principal; and where a conveyance by an attorney is in execution of letters of attorney, it shall pass the interest of the principal though not formally executed in his name; but in all cases the attorney must have been appointed by some writing duly executed by the principal." *Id.*, § 194.

"Any writing revoking letters of attorney may, when acknowledged or proved as conveyances of land are required to be acknowledged or proved, be recorded in like manner, and with like effect from the time of being filed for record, in the office in which the letters revoked were recorded." *Id.*, § 196.

"The death of the principal shall not operate a revocation of an agency created by him, as to one who, without notice of such death, in good faith and under circumstances repelling imputation to him of fraud or negligence, deals with such agent, believing upon good reason that he is still such; and this shall apply whether the agency were created by writing or not." *Id.*, § 197.

"Until revoked in writing or by death, letters of attorney duly recorded shall continue in force as to all persons who may deal with the attorney in good faith without notice." *Id.*, § 198.

FORM OF LETTER OF ATTORNEY TO CONVEY LAND.

"Know all, that I, George Poindexter, of County, Mississippi, do hereby appoint Albert Brown, of County, my attorney in fact, with full power to sell and convey in fee simple, with general warranty [or without warranty, or as the case may be] of title, that land situated in [describe it]. Witness my signature, the of A. D.

GEORGE POINDEXTER." *Id.*, § 199.

"A letter of attorney to transact any business need only express plainly the authority conferred." *Id.*, § 201.

Sec. 611. Missouri. "Every letter of attorney, or other instrument containing a power to convey real estate, as agent or attorney for the owner thereof, or to execute, as agent or attorney for another, any instrument in writing conveying real estate, or whereby real estate may be affected in law or equity, shall be acknowledged or proved, and certified and recorded, as other instruments in writing conveying or affecting real estate are required to be acknowledged or proved and certified and recorded." Rev. Stat. 1889, § 2425.

"No such letter of attorney, or other instrument, certified and recorded in the manner prescribed in the preceding section, shall be deemed to be revoked by any act of the party by whom it was executed, until the instrument containing such revocation shall be deposited for record in the same office in which the instrument containing the power is recorded." Rev. Stat. 1889, § 2426.

"A married woman may convey her real estate, or relinquish her dower in the real estate of her husband, by a power of attorney authorizing its conveyance, executed and acknowledged by her jointly with her husband, as deeds conveying such real estate by them are required to be executed and acknowledged." Rev. Stat. 1889, § 2397.

Sec. 612. Montana. "When an attorney in fact executes an instrument transferring an estate in real property, he must subscribe the name of his principal to it, and his own name as attorney in fact." Civ. Code, § 1504.

"A power of attorney of a married woman, authorizing the execution of an instrument transferring an estate in her separate real property, has no validity for that purpose until acknowledged by her in the manner provided in §§ 1606 and 1611." Civ. Code, § 1503.

Powers of attorney must be executed and recorded as conveyances of real estate; and cannot be revoked except by written instrument duly recorded in the same office where the power is recorded. Civ. Code, §§ 1641-1643. A power of attorney to mortgage must be executed and recorded same as a power to convey. Civ. Code, § 3822.

Sec. 613. Nebraska. The general provisions of the statute on conveyances do not expressly apply to powers of attorney, but, when properly acknowledged and proved, they may be recorded and the record or certified copy thereof is made evidence. Comp. Stat. 1895, § 4140.

Sec. 614. Nevada. A power of attorney must be acknowledged, proved and recorded same as other conveyances, and can only be revoked by written instrument deposited for record in the same office in which the instrument containing the power is recorded. Gen. Stat., §§ 2596, 2597. The deposit for record of a revocation of a power of attorney in the proper office operates under the statute as notice to all parties dealing with the attorney. By such deposit the revocation becomes absolute without notice to the attorney. *Arnold v. Stevensagn*, 2 Nev. 234.

Sec. 615. New Hampshire. "Every power of attorney to convey real estate must be signed, sealed, attested and acknowledged,

and may be recorded as required for a deed, and a copy of the record may be used in evidence, whenever a copy of the deed so made is admissible." Pub. Stat., Ch. 137, § 6.

A power of attorney to convey real estate ought to be as certain as it is necessary for the deed to be which is to be executed under it. It should possess the same requisites, and the same solemnities and formalities should be observed in its execution, as are necessary in a deed directly conveying the estate. *Gage v. Gage*, 30 N. H. 420. *Lumbard v. Aldrich*, 8 N. H. 31 (28 Am. Dec. 381). It must be acknowledged or proved as required by the statute in order to be recorded. *Montgomery v. Dorian*, 6 N. H. 250.

Sec. 616. New Jersey. Powers of attorney are to be executed and recorded the same as deeds. Gen. Stat. 1895, Vol. 1, p. 871, § 98. A married woman may convey by power of attorney, her husband joining in the execution of the power, provided it contains a full and particular description of lands authorized to be conveyed, and it be acknowledged in the manner prescribed for acknowledgment by married women. Id., p. 811, § 11. For act validating certain conveyances made under a power by married women. Id., p. 866, § 76. For general act validating conveyances under power of attorney. Id., p. 892, § 192.

Sec. 617. New Mexico. A power of attorney must be executed and recorded the same as a conveyance. Comp. Laws, § 2765; and can only be revoked by a written instrument properly lodged for record in the office in which such power of attorney is registered. Id., § 2766.

Sec. 618. New York. "An instrument containing a power to convey real property, as the agent or attorney for the owner of the property, acknowledged or proved and certified, in the manner to entitle a conveyance to be recorded, may be recorded by the recording officer of any county in which any of the real property to which it relates is situated." Laws 1896, Vol. 1, Ch. 547, § 244.

"A power of attorney or other instrument, recorded pursuant to this article, is not deemed revoked by any act of the party by whom it was executed, unless the instrument containing such revocation is also recorded in the same office in which the instrument containing the power was recorded." Laws 1896, Ch. 547, Vol. 1, § 273. A married woman may execute a power of attorney. Birdseye's Rev. Stat. 1896, Vol. 1, p. 932; Id., Vol. 3, p. 2631.

Sec. 619. North Carolina. "Every power of attorney wherever made or concerning whatsoever matter may be registered on acknowledgment or probate of the same in the county wherein the property or estate may be situate, if it concern the conveyance thereof; and if the same do not concern the conveyance of any estate or property, then in the county where the attorney may reside or the business is to be transacted. And such powers of attorney as do not concern the conveyance of land by a *feme covert*, whereof it may be necessary to take the acknowl-

edgment or probate out of the state, may, besides the other modes provided in this chapter, be acknowledged or proved before any mayor or presiding magistrate of any city or a clerk of a court of record; and such acknowledgment or probate being duly taken and certified under the seal of office of such officer shall, on the same being produced before the clerk of the superior court of the proper county, be ordered by him to be registered, and shall be registered." Code, § 1249. A married woman, her husband joining with her, may execute a power of attorney. Code, § 1257.

Sec. 620. North Dakota. A power of attorney must be by written instrument. Rev. Codes, §§ 3531, 4711.

Sec. 621. Ohio. "A power of attorney for the conveyance, mortgage, or lease of any estate or interest in real property, shall be signed, attested, acknowledged, and certified in the same manner as deeds, mortgages, and leases." Smith & Benedict's Rev. Stat., § 4108 (Ballards' Ohio Law of Real Property, § 204).

"A deed, mortgage, or lease of any estate or interest in real property, made by virtue of a power of attorney, shall contain the name of the grantor, mortgagor, or lessor, and shall convey, mortgage, or lease the estate or interest of the grantor, mortgagor, or lessor in the real property so conveyed, mortgaged, or leased, as fully as if such deed, mortgage, or lease were executed by the grantor, mortgagor, or lessor in person; but at any time previous to the conveyance, mortgage, or lease, the grantor, mortgagor or lessor, may revoke such power of attorney so far as relates to the interest of the grantor, mortgagor, or lessor therein." S. & B. Rev. Stat., § 4109 (Ballards' Ohio Law Real Prop., § 205).

"No deed of real estate executed by any person acting for another, under a power of attorney duly executed, acknowledged, and recorded, shall be held to be invalid or defective because he is named therein, as such attorney, as the grantor, instead of his principal, nor because his name, as such attorney, is subscribed thereto, instead of the name of his principal; nor because the certificate of acknowledgment, instead of setting forth that the deed was acknowledged by the principal, by his attorney, sets forth that it was acknowledged by the person who executed it, as such attorney; but all such deeds so executed shall be as valid and effectual, in all respects, within the authority conferred by such powers of attorney, as if they had been executed by the principals of such attorneys, in their own proper persons." S. & B. Rev. Stat., § 4110 (Ballards' Ohio Law Real Prop., § 207).

"A power of attorney for the conveyance, mortgage, or lease of any estate or interest in real property, shall be recorded in the office of the recorder of the county in which such real property is situated, previous to the execution of any deed, mortgage, or lease by virtue of such power of attorney." S. & B. Rev. Stat., § 4131 (Ballards' Ohio Law Real Prop., § 1088).

"No instrument containing a power of attorney for the conveyance, mortgage, or lease of any estate or interest in real property, which has been recorded, is to be deemed revoked by any act of the person by whom

it was executed, unless the instrument containing such revocation is also recorded in the same office in which the instrument containing the power of attorney was recorded." S. & B. Rev.Stat., § 4132 (Ballards' Ohio Law Real Prop., § 1089).

Sec. 622. Oklahoma. A power of attorney is executed the same as a conveyance, and no deed executed under the same shall be received for record unless the power of attorney is or has been filed for record in the same office. Rev. Stat. 1893, par. 1616.

Sec. 623. Oregon. A power of attorney may be recorded and when so recorded the record or a certified copy thereof is evidence; and no power so recorded is revoked unless the written instrument revoking the same be recorded in the same office in which the power is recorded. Hill's Ann. Laws, §§ 3035, 3036. The acknowledgment and recording of a power is not necessary as between the parties thereto, these requirements are for the benefit of third persons. *McAdow v. Black*, 4 Mont. 475 (1 Pac. Rep. 751). As to sufficiency of acknowledgment of power, see, *McAdow v. Black*, 6 Mont. 601 (13 Pac. Rep. 377).

Sec. 624. Pennsylvania. All and every bonds, specialties, letters of attorney and other powers in writing, which shall be produced in any court, or before any magistrate in this province, the execution whereof being proved by two or more of the witnesses thereunto before any mayor or city magistrate or officer of the cities, towns or places where such bonds, letters of attorney or other writings are or shall be made or executed, and accordingly certified under the common or public seal of the cities, towns or places where the said bonds, letters of attorney or other writings are so proved respectively, shall be taken and adjudged as sufficient in law, as if the witnesses therein named had been present, and such certification shall be sufficient evidence to the court and jury for the proof thereof. Brightlys Purdon's Dig. (12th Ed.), p.152, § 1.

All sales or conveyances of lands, tenements or hereditaments which shall hereafter be made by virtue of any letters or powers of attorney or agency, duly executed, which do or shall expressly give power to sell lands or other estates, and be certified to have been proved as aforesaid, or shall be proved in this province by any justice of the peace, by one or more of the witnesses thereto, shall be good and effectual in law, to all intents, constructions and purposes, whatsoever, as if the said constituent or constitutents had, by their own deeds, bargains and sales, actually and really sold and conveyed the same. Id., § 2.

Provided always, That no sale of lands, tenements and hereditaments, made by virtue of such power or powers of attorney or agency as aforesaid, shall be good and effectual, unless such sale be made and executed while such power is in force, and all such powers shall be accounted, deemed and taken to be in force, until the attorney or agent shall have due notice of a countermand, revocation or death of the constituent. Id., § 3.

Any trustee, executor or other person acting in a fiduciary character, with power to convey lands or tenements in Pennsylvania, may make conveyance under such power by and through an attorney or attorneys duly constituted, and such conveyance shall be of the same validity as if executed personally by the constituents; and all conveyances so heretofore *bona fide* made by such trustees, are hereby confirmed: *Provided*, That nothing herein contained shall authorize any person so acting in a fiduciary character, to delegate to others the discretion vested in himself for the general management of his trust. *Id.*, § 4.

All powers of sale contained in any instrument which has heretofore been made or delivered by any person or persons, to his, her or their agent or attorney in fact, and all powers to sell or let real estate on ground rent, contained in any deed, will or other instrument heretofore executed, shall be deemed and taken to authorize sales, conveyances and leases, either public or private, unless expressly restricted by the instrument to one or the other mode, and all private sales heretofore *bona fide* made under such power are hereby confirmed. *Id.*, § 5.

All letters of attorney authorizing contracts to be made, the adjustment of accounts, the sale of stocks and personal estate, the receipt of money, or the discharges and acquittance of legacies, or distributive shares, when executed, proved or acknowledged in other states or foreign countries, by any person or husband and wife, in manner authorized to allow letters of attorney for the conveyance of real estate to be put on record, or if proved or acknowledged in like manner before any minister, consul or vice-consul of the United States, or officer thereof exercising ministerial or consular functions, or before a notary public in foreign countries and duly certified under his official seal, may be placed on record in the recorder of deed's office, in any county where the powers conferred by such letters are intended to be exercised, and receivable in evidence in court of justice, as also the exemplifications from the record thereof, when the originals shall have been lost. *Id.*, § 6.

Any and every grant, bargain and sale, release or other deed of conveyance or assurance of any lands, tenements or hereditaments in this commonwealth, and any power or powers of attorney to make and execute such sale, conveyance, mortgage or transfer of any lands, tenements or hereditaments in this commonwealth, made and executed in any of the United States, may be recorded in the country in which such lands, tenements and hereditaments are situated, if the acknowledgment thereof be taken in due form before any officer or magistrate of the state wherein such deed, *et cetera*, is executed, authorized by the laws of said state to take the acknowledgment of deeds or other instruments of writing therein; and the proof of such authority shall be the certificate of the clerk or prothonotary of any court of record in such state, that the officer or magistrate so taking such acknowledgment is duly qualified by law to take the same. *Id.*, § 7.

Whenever any deed of conveyance or other instrument of writing has been heretofore executed or acknowledged, or both; under any power sufficiently authorizing the same, which power shall have been recited in

said deed or other instrument, shall have been informally executed by an attorney, in his own name, reciting his authority, instead of being executed in the name of the principal or principals, such deed or instrument shall be taken to be of the same validity and effect as if executed in the name and behalf of the principal or principals, as a party or parties thereunto: *Provided*, That no case heretofore decided judicially shall be affected by this act. Id., § 8.

Sec. 625. Tennessee. "Instruments in relation to real or personal property, executed by an agent or attorney, may be signed by such agent or attorney for his principal; or by writing the name of the principal by him as agent or attorney; or by simply writing his own name or his principal's name, if the instrument on its face shows the character in which it is intended to be executed." Code 1896, § 3679.

The power and its revocation may both be recorded. Code 1896, § 3697. As to presumptions in favor of deeds executed by attorney which have been recorded for twenty years, see Code 1884, §§ 2901, 2902.

Sec. 626. Utah. A power of attorney must be acknowledged or proved and recorded as other conveyances of real estate, and when so recorded can only be revoked by written instrument duly deposited for record in the same office in which the instrument containing the power is recorded. Comp. Laws, §§ 2614, 2615. The statute provides that a power of attorney duly proved or acknowledged and certified so as to be entitled to record, may, together with the certificate of its proof or acknowledgment be sent by telegraph, and a telegraph copy or duplicate thereof have the same force and effect, and be recorded as the original. Id., § 2305. As to married woman's conveyance by power, see 2 Ballards' Annual, § 422.

Sec. 627. Vermont. "No deed or other conveyance of lands, or of an estate or interest therein, made by virtue of power of attorney, shall be of any effect, or admissible in evidence, unless such power of attorney is signed, sealed, attested, and acknowledged and recorded in the office where by law such deed is required to be recorded." Statutes (1894) § 2221. A power of attorney executed and acknowledged without the state conformably to the laws of the state where executed is sufficient. Statutes 1894, § 2232.

Sec. 628. Virginia. "If, in a deed made by one as an attorney in fact for another, the words of conveyance or the signature be in the name of the attorney, it shall be as much the principal's deed as if the words of conveyance or the signature were in the name of the principal by the attorney, if it be manifest on the face of the deed that it should be construed to be that of the principal to give effect to its intent." Code, § 2416.

"A power of attorney may be admitted to record in any county or corporation." Id., § 2499. A non-resident married woman, her husband joining her, may execute power of attorney to convey land. Code, § 2509.

Sec. 629. Washington. A power of attorney must be executed the same as a conveyance of land. Husband and wife may either execute powers for sale and conveyance of his or her separate estate without the other joining, and they may appoint each other as attorney in fact. Code 1896, § 2135. A deed or other instrument executed under a power shall be executed and acknowledged the same as if the person making the same were unmarried. Id., § 2136. Either husband or wife may authorize the disposition of their separate interests in community property by power of attorney. Id., § 2137. For statute validating conveyances under power of attorney, see Id., § 2138.

Sec. 630. West Virginia. "Power of attorney may be admitted to record in any county." Code, Ch. 73, § 1. The provisions of § 3, Ch. 71, of the Code are the same as those of § 2416 of the Va. Code heretofore set out. A power of attorney executed out of the state before a notary public, accompanied by a certificate of his official character, under seal of a court, is sufficient. Code, Ch. 130, § 21.

Sec. 631. Wisconsin. A power of attorney when executed in the same manner as a conveyance may be recorded, in the proper office in any county in which any of the lands to which such power relates are situated. Sanborn & Berryman's Stat., § 2237. When so executed and recorded it cannot be revoked except by written instrument recorded in the same office as the power. Id., § 2246. Powers of attorney are not affected by general statute on "Powers." Id., § 2157.

Sec. 632. Wyoming. A power of attorney is not a "conveyance" within the meaning of that word as used in the general statute regulating the execution of conveyances, but if it is properly acknowledged or proved it may be recorded. Rev. Stat., § 25. When recorded it can only be revoked by written instrument duly executed and recorded in the same office as the power. Id., § 26.

PUBLIC LANDS.

EPITOME OF CASES.

Sec. 633. Power of land department—Conclusiveness of its decisions. The commissioner of the general land office has power to cancel an entry, but this power is not unlimited, and when it has been exercised under a mistake as to the law to the injury of the rightful claimant, a court of equity will correct the error, and compel the holder of the

patent to convey to the one who but for such mistake would have obtained the patent himself. Decisions of the land department on matters of fact are binding upon courts where the parties interested have been heard, or have had an opportunity to be heard; and courts will presume that the power of the land department has been properly executed. *Parsons v. Venzke*, 4 N. Dak. 452 (61 N. W. Rep. 1086; 50 Am. St. Rep. 669). See opinion for collation of authorities.

Sec. 634. Power of state courts over public lands. Prior to the issue of a patent state courts have power to deal with the possession of public lands and will protect the possessory rights of those entitled to the same under the laws relating thereto, and in order to do this they may inquire into the status of the claimants before the land department. The possessory rights of one having a valid homestead entry may be protected against a trespasser by mandatory injunction. *Reaves v. Oliver*, 3 Okla. 62 (41 Pac. Rep. 858). Where two parties have a right to the joint use and occupancy of a homestead entry until the decision of the land department determines who is entitled to it, state courts cannot interfere. *Littlefield v. Todd*, 3 Okla. 1 (42 Pac. Rep. 10). The possessory rights of a claimant of public lands which have been adjudicated to be in him by the land department may be enforced by a state court by mandatory injunction. *Woodruff v. Wallace*, 3 Okla. 355 (41 Pac. Rep. 857). See opinion for exhaustive discussion of this subject. Under S. Dak. Stat., Comp. Laws, §§ 4601, 4610, it is held that a settler upon public land previously unoccupied, who has placed a timber culture filing thereon, and is in good faith complying with the laws of congress in relation thereto, is entitled as against third persons, to the possession of all the land that he will ultimately take by his patent; and under sufficient pleadings and proof he may recover damages for the wrongful occupation of the same and as against trespassers who have forcibly ejected or excluded him therefrom he may recover three times such a sum as would compensate for the detriment thus caused. *Olson v. Huntamer*, S. Dak. (61 N. W. Rep. 479).

Sec. 635. Contracts concerning public lands. The public lands are not a lawful subject of a private contract, and

an attempted conveyance thereof by one private person to another passes no interest whatever in the land, and does not create the relation of vendor and vendee, and therefore cannot be held to furnish a consideration for the payment, the promise of payment, or the recovering of the supposed consideration of such conveyance. *Lamb v. James*, 87 Tex. 485 (29 S. W. Rep. 647). A contract of a purchaser of public lands to convey them to another, made in violation of a statute (Act Cong. Mar. 3, 1885), requiring him to make oath that he purchased for his own use, is against public policy and will not be specifically enforced. *Kine v. Turner*, 27 Ore. 356 (41 Pac. Rep. 664).

Sec. 636. Water rights on public lands. U. S. Rev. Stat., §§ 2839, 2840, providing that prior vested water rights legally acquired on public lands shall be protected, and the rights of subsequent preemption claimants shall be subject thereto, protect one who discovers percolating waters on such lands and collects and uses the same by the means of digging a well, but a subsequent locator may dig another well though it dry up the one first located. *Sullivan v. Northern Spy Min. Co.*, 11 Utah 488 (40 Pac. Rep. 709; 30 L. R. A. 186). These sections construed in connection with Civ. Code Cal. § 1412, providing that one entitled to the use of water may change the place of diversion if others are not injured thereby, do not confer the right upon an appropriator of water on public land to go upon the land after its entry by another as a homestead, but before the claimant has made final proof, to change the point of diversion and construct new ditches. But an appropriator of water on public land by wrongfully changing the point of diversion and building new ditches after the land has been entered by another as a homestead, does not lose his right to the use of the water. *McGuire v. Brown*, 106 Cal. 660 (39 Pac. Rep. 1060; 30 L. R. A. 384). See, Irrigation.

Sec. 637. Title of state in lands reserved by congress for school purposes. In construing § 15, Organic Act of Utah (Act of Cong. Sept. 9, 1850), which provides that, when lands in such territory shall be surveyed under direction of the government, sections 16 and 36 in each township "shall

be, and the same are hereby reserved for the purpose of being applied to schools in said territory," etc., it is held that such reservation does not amount to an absolute grant of such lands to the territory, and even after their survey, they are under the dominion, protection and control of the United States government, and are "public lands" within the meaning of Act Cong. Feb. 25, 1885, making it unlawful for one having no claim or color of title thereto to enclose public lands. *United States v. Elliott*, 12 Utah, 119 (41 Pac. Rep. 720), reversing a former opinion in the same case, 7 Utah 389 (26 Pac. Rep. 1117). But the supreme court of Mississippi, in construing the instrument by which the lands composing that state were ceded to the United States by the state of Georgia on Apr. 24, 1802, in which it was provided that such territory, upon the happening of certain conditions, should be admitted as a state "with the same privileges, and in the same manner, as provided in the ordinance of congress of the 13th day of July, 1787, for the government of the Western Territory of the United States," and Act of Cong. March 3, 1803, providing that in the survey and sale of public lands in the territory, all sixteenth sections were "reserved in each township for the support of schools within the same," holds that on the admission of Mississippi as a state the title to the sixteenth sections vested in it without grant from the United States. *Jones v. Madison Co.*, 72 Miss. 777 (18 So. Rep. 87). This opinion contains an extensive collation of authorities and discussion of this subject, and overrules *Hester v. Crisler*, 36 Miss. 681. The territorial legislature of Utah has no power to pass a law authorizing the local authorities to lease land reserved by the United States for school purposes. *Burrows v. Kimball*, 11 Utah 149 (41 Pac. Rep. 719).

Sec. 638. School lands—Miscellaneous notes. A lessee of school lands under a void lease may assert against the school authorities rights which he has acquired by adverse possession against one holding a prior valid lease. *Jones v. Madison Co.*, 72 Miss. 777 (18 So. Rep. 87). Cal. Pol. Code, § 8549, applied—service by publication in action to foreclose interest of purchaser of school lands for non-payment of purchase price. *People v. Harrison*, 107 Cal. 541 (40 Pac. Rep.

956). Miss. Code 1892, § 4148 applied—title to school lands by adverse possession. *Amite Co. v. Steen*, 72 Miss. 567 (17 So. Rep. 980). Tex. Act 1891, p. 180, Ch. 87, § 1, validating sales of school lands applied, *Collyns v. Cain*, 87 Tex. 612 (80 S. W. Rep. 858). The commissioner of school lands is neither a necessary nor proper party to a chancery suit brought in the name of the state of West Virginia, under § 6, Ch. 24, Acts 1893, and therefore he is not entitled to appeal from the decrees of the circuit court in such suit. *Lawson v. Hart*, W. Va. (20 S. E. Rep. 819).

Sec. 639. Swamp lands. A cancellation of a swamp-land claim by the department of the interior without any notice to the claimant is void, and may be attacked collaterally. *Young v. Hanson*, Ia. (64 N. W. Rep. 654). In construing Act Cong. July 28, 1866 (14 Stat. 218), providing an additional method for identifying the swamp and overflowed lands conveyed to the state of California by Act Cong. Sept. 28, 1850, it is held that the designation of certain lands as swamp and overflowed lands on a township plat filed by the surveyor-general operates as a determination by the United States that such lands were of that character on the date of the latter act, and that title thereto vested in the state at that time. *McCabe v. Goodwin*, 106 Cal. 486 (39 Pac. Rep. 941). The grant of swamp and overflowed lands to the several states by the act of congress of September 28, 1850, was a grant *in praesenti*, and operated as an immediate transfer to the state of California of all the lands within its boundaries which at that date were "swamp and over-flowed," within the meaning of the act. *McCabe v. Goodwin*, 106 Cal. 486 (39 Pac. Rep. 941). Citing, *Wright v. Roseberry*, 121 U. S. 488 (7 Sup. Ct. Rep. 958); *Tubbs v. Wilhoit*, 188 U. S. 184 (11 Sup. Ct. Rep. 279), affirming 78 Cal. 61 (14 Pac. Rep. 861). One who, as the assignee of a certificate of purchase of swamp and overflowed lands under Cal. Act Apr. 21, 1858 (Stat. 1858, p. 198), is entitled to a patent, cannot be deprived thereof by the subsequent adoption of a constitutional provision prohibiting the granting of such lands except to a certain class of persons to which he does not belong. Cal. Const. Art. 17, § 8, applied. *McCabe v. Goodwin*, 106 Cal. 486 (39

Pac. Rep. 941). Cal. Pol. Code, §§ 8446, 8456, applied—reclamation of swamp lands—conclusiveness of assessment—qualification of commissioners. *Lower Kings Riv. Rec. Dist. v. Phillips*, Cal. (89 Pac. Rep. 680; 41 Pac. Rep. 885). A statute (Mo. Gen. Stat. 1865, ch. 68, § 20) authorizing a county to mortgage or sell its overflowed or swamp lands to pay its subscription for railroad stock, does not authorize it to deed such lands in payment of such subscription. *Moss v. Kauffman*, 181 Mo. 424 (88 S. W. Rep. 20).

Sec. 640. “Mining claim” defined—Laborer’s lien. A statute (Cal. Code Civ. Proc., § 1188), providing that “every person who performs labor upon any mining claim has a lien upon the same” is held not to authorize a lien for labor in working a mine on lands held under an agricultural patent from the United States. *Morse v. DeAdro*, 107 Cal. 622 (40 Pac. Rep. 1018). The court say: “At the time of the passage of this section, the term ‘mining claim’ had been used in statutes, and had a well-defined meaning which had attached to it, not only by popular acceptance, but by the countenance and authority of judicial decisions. ‘What, then, is a “mining claim”?’ asks the court in *Mining Co. v. Collison*, 5 Sawy. 489, Fed. Cas. No. 9886, and, answering its own interrogatory, declares: ‘A “mining claim” is the name given to that portion of the public mineral lands which the miner, for mining purposes, takes up and holds in accordance with mining law.’ In *Helm v. Chapman*, 66 Cal. 291 (5 Pac. Rep. 852), work had been done in the slopes and levels of a mine on a mining claim, and a lien was sought to be enforced for the value thereof. This court said: ‘Section 1188 does not, it is true, provide for liens upon mines, but upon “mining claims.” The lien, if it exists, extends to the whole claim.’ In *Williams v. Association*, 66 Cal. 198 (5 Pac. Rep. 85), the question came squarely before the court, and it is thus treated: ‘But, if it be conceded that one who works upon or in a mining claim, may secure a lien for the value of his labor on the whole claim, the court below did not find that plaintiff or his assignors “bestowed labor” upon a mining claim. A “mining claim,” as the term is used in the statutes of the United States, is that portion of a vein or lode and of the adjoining surface, or of the surface

and subjacent material, to which a claimant has acquired the right of possession by virtue of a compliance with the laws of the United States and the local rules and customs of miners. Copp, U. S. Min. Dec. 136, 142; Weeks, Min. 118. Independent of act of congress providing a mode for the acquisition of title to the mineral lands of the United States, the term "mining claim" has always been applied to a portion of such lands to which the right of exclusive possession and enjoyment, by private person or persons, has been asserted by actual occupation, or by compliance with local mining laws, or rules, or customs.' "

Sec. 641. Mining lands—Location and relocation—Forfeiture. Particular marking of the location of a mining claim held sufficient under U. S. Rev. Stat., § 2324, requiring that "the location must be distinctly marked on the ground so that its boundaries can be readily traced." *Warnock v. De Witt*, 11 Utah 324 (40 Pac. Rep. 205). The location of a mining claim may be made by one person in the name of another, and when so made the person in whose name it is made becomes vested with the legal title to the claim which cannot be defeated by parol proof of a subsequent agreement by him to hold the same in trust. U. S. Rev. Stat., § 2323, applied. *Moore v. Hamerslag*, 109 Cal. 122 (41 Pac. Rep. 805). An agent or attorney in fact may locate a mining claim for his principal, and may do everything necessary to perfect such location, including the making of the affidavit required by Idaho Rev. Stat., § 3104. *Dunlap v. Pattison*, Idaho, (42 Pac. Rep. 504). U. S. Rev. Stat., § 2324, authorizing the forfeiture of a co-owner's interest in a mining claim for his failure to contribute his proportion of the expenditures thereon, by the publication of notice to him, does not authorize a forfeiture of a co-owner's interest simply upon publication of such notice when he is not in fact in default. *Brundy v. Mayfield*, 15 Mont. 201 (38 Pac. Rep. 1067). A locator of a mining claim who has allowed his location to lapse on account of his failure to make the necessary annual expenditure and become subject to relocation under U. S. Rev. Stat., § 2324, may make a new location covering the same ground. *Warnock v. De Witt*, 11 Utah 324 (40 Pac. Rep. 205). Particular

facts held insufficient to constitute a resumption of work by a locator who has forfeited his rights by virtue of this statute. *Bishop v. Baisley*, 28 Ore. 119 (41 Pac. Rep. 936). U. S. Rev. Stat., § 2324, applied—forfeiture of mining claim for failure to make the necessary yearly expenditure. *Hirschler v. McKendricks*, 16 Mont. 211 (40 Pac. Rep. 290); *Bishop v. Baisley*, 28 Ore. 119 (41 Pac. Rep. 936). A subsequent locator of a mining claim who bases his title upon a forfeiture under this statute by the prior locator has the burden of proving such forfeiture. *Bishop v. Baisley*, 28 Ore. 119 (41 Pac. Rep. 936). U. S. Rev. Stat., § 2324, requiring the expenditure of a given amount of work yearly on a mining claim by the locator applied to a particular location of several mines by different persons in common. *Eberle v. Carmichael*, N. M. (42 Pac. Rep. 95). Mont. Gen. Laws, Div. 5, § 1477, construed and applied—notice of location of mining claim—verified declaratory statement by discoverer. *McCowan v. McLay*, 16 Mont. 234 (40 Pac. Rep. 602). *Berg v. Koegel*, 16 Mont. 266 (40 Pac. Rep. 605).

Sec. 642. Mining lands—Miscellaneous notes. In the recent case of *Fitzgerald v. Clark*, 17 Mont. 100 (42 Pac. Rep. 273; 30 L. R. A. 803), the supreme court of Montana give an exhaustive discussion, collecting all the authorities, on the proper construction of U. S. Rev. Stat., § 2322, defining the rights of a mining locator in a vein of which the apex is within his location. An application for a patent to a placer claim may be cancelled where the lands are agricultural, and not mineral. U. S. Rev. Stat., §§ 2325, 2329, applied. *German Ins. Co. v. Hayden*, 21 Colo. 27 (40 Pac. Rep. 453). For collection of authorities upon the construction and proper application of U. S. Rev. Stat., § 2333, exempting land from the grant of a placer patent on account of the known existence of a lode or vein thereon, see, *Brownfield v. Bier*, 15 Mont. 403 (39 Pac. Rep. 461). *Butte & B. Min. Co. v. Sloan*, 16 Mont. 97 (40 Pac. Rep. 217). U. S. Rev. Stat., § 2332, providing that evidence of the possession and working of a mining claim for a period equal to the statute of limitations of the state shall establish a right to a patent, in the absence of any adverse claim. merely authorizes a patent to issue to an appli-

cant who has held for such period, provided no one files an adverse claim in the land office; and does not give one a right to the claim merely because he has worked it for the statutory time without any adverse claim being made. *McCowan v. McLay*, 16 Mont. 234 (40 Pac. Rep. 602). U. S. Rev. Stat., §§ 2325, 2326, construed and applied—adverse claim proceedings. *Mars v. Oro Fino Min. Co.*, S. Dak. (65 N. W. Rep. 19); *German Ins. Co. v. Hayden*, 21 Colo. 27 (40 Pac. Rep. 453); *McCowan v. McLay*, 16 Mont. 234 (40 Pac. Rep. 602). Pleading and practice in such proceedings, *Iba v. Central Ass'n of Wyoming*, Wyo. (40 Pac. Rep. 527; 42 Pac. Rep. 20). A co-owner of a mining claim need not file an adverse claim in the land office under U. S. Rev. Stat., § 2325, in order to prevent his co-owners from acquiring his interest by procuring a patent in their own name. *Brundy v. Mayfield*, 15 Mont. 201 (38 Pac. Rep. 1067). U. S. Rev. Stat., § 2336, applied—intersecting veins—rights of “prior location” to ore. *Stinchfield v. Gillis*, 107 Cal. 84 (40 Pac. Rep. 98). Particular fact case as to the date of the discovery of a mining vein. *Walsh v. Mueller*, 16 Mont. 180 (40 Pac. Rep. 292).

Sec. 643. Tide lands. In Oregon all tide lands belong to the state and are subject to its disposition and control, and Hill's Ann. Laws, § 855, subd. 5, establishing rules for the construction of conveyances in which it is provided that “when tide-water is the boundary, the rights of the grantor to low-water mark are included in the conveyance, and also the right of this state between high and low-water mark,” does not operate as a grant by the state of tide lands belonging to it to the proprietors of the adjacent bank. *Astoria Exchange Co. v. Shively*, 27 Ore. 104 (40 Pac. Rep. 92). An application for a mandamus to compel the commissioner of public lands to issue a certificate of purchase for certain tide lands must contain the evidence upon which the refusal of the commissioner was based. *State v. Forrest*, 11 Wash. St. 158 (39 Pac. Rep. 450). Hill's Wash. Code, §§ 2162, 2165, construed and applied—sale of “tide and shore lands” by the land commissioner—what are “tide lands.” *State v. Forrest*, 11 Wash. St. 227 (39 Pac. Rep. 684). Wash. Act Mar. 26,

1895, construed and applied—appraisement of tide lands—appeal. *Scott v. Forrest*, 18 Wash. 166 (42 Pac. Rep. 519). Hill's Wash. Code, § 2172, applied—exclusive right of one who has made valuable improvements “for commerce, trade or business” to purchase. *Barlow v. Gamwell*, 12 Wash. 651 (42 Pac. Rep. 115).

Sec. 644. Town site lands. Actual residence is not necessary to make one an “occupant” of a lot settled under the Act of Congress May 14, 1890, regulating the settlement of town-site lands, but one may acquire the rights of an occupant by improvement of the property for the purpose of trade, business or residence. *Hagar v. Wikoff*, Okla. (39 Pac. Rep. 281); *Downman v. Saunders*, Okla. (41 Pac. Rep. 104). The interest in a town lot on public lands acquired by occupancy may be transferred and conveyed, and the grantee will succeed to all the rights of his grantor. *Hagar v. Wikoff*, Okla. (39 Pac. Rep. 281). Town-site trustees appointed under the Act of Congress of May 14, 1890, relating to town sites in Oklahoma, in the discharge of their duty bear the same relation to the disposition of town lots that registers and receivers do to the disposal of public lands, and their decisions on controverted questions of fact are conclusive, and can only be reviewed on appeal to the proper departmental officers. *King v. Thompson*, 3 Okla. 644 (39 Pac. Rep. 466). The courts will not inquire into the facts or evidence upon which the findings are based, unless it is clearly made to appear that such findings were procured by fraud, imposition, or misrepresentation, to the manifest injury of the party complaining. *Myers v. Berry*, 3 Okla. 612 (41 Pac. Rep. 581). A court of equity will only interfere to prevent injustice and wrong after the matter has been finally determined in the land department by reason of a misapplication of law to facts found by such officers, or on account of fraud or imposition. *King v. Thompson*, 3 Okla. 644 (39 Pac. Rep. 466). The commissioners appointed by the probate judge to set off the lots to occupants of a town site are not a judicial tribunal, and their award is not a judicial determination, and it is unnecessary, in the petition of one who seeks to recover lots by virtue of his

actual occupancy as against one who holds the deed from the probate judge, to allege fraud in the making of such award, in order to state a cause of action in his petition. *Downman v. Saunders*, 3 Okla. 227 (41 Pac. Rep. 104). Section 17 of the act of congress approved March 3, 1891 (26 Stat. 1026), modifies section 2387, Rev. Stat. U. S., repudiates the act of Oklahoma legislature approved December 25, 1890 (St. Okl. 1893, p. 1145), and adopts the statutes of Kansas determining the jurisdiction of probate judges in town-site matters and prescribing the regulations for executing such trust. *Brown v. Parker*, 2 Okla. 258 (39 Pac. Rep. 567). See opinion for discussion of powers and duties of probate judges and jurisdiction of commissioners appointed to survey and plat town-sites. Where a settler upon a lot claiming under the act of congress of May 14, 1890, fails to assert any right to the lot before the board of town site trustees, and such failure was wholly on account of his own *laches*, he becomes thereby estopped from obtaining relief in a court of equity. *Bassett v. Mitchell*, 3 Okla. 177 (41 Pac. Rep. 601). One who has deprived a prior settler on a town-site of his possession by force and retained it in the same way cannot defeat such prior settler's claim on account of the meagerness of the improvements made by him. *Downman v. Saunders*, 3 Okla. 227 (41 Pac. Rep. 104). The poverty of a claimant for town lots in a town-site will not excuse him from complying with the laws of the United States and the rules of the land department, nor constitute a sufficient excuse to entitle him to the intervention of a court of equity. *Baldwin v. Mason*, 3 Okla. 237 (41 Pac. Rep. 388); *Schultz v. Jones*, 3 Okla. 504 (41 Pac. Rep. 400); *Matthews v. Young*, 3 Okla. 649 (41 Pac. Rep. 432). Act Cong. May 14, 1890, construed and applied—town-site lands in Oklahoma—survey and plat of—powers of congress. *City of Guthrie v. Beamer*, 3 Okla. 652 (41 Pac. Rep. 647). Act Cong. Mar. 3, 1891; U. S. Rev. Stat., §§ 2387, 2388, construed and applied—review of decisions of town-site commissioners. *Chisholm v. Weisse*, 2 Okla. 611 (39 Pac. Rep. 467). Cal. Act Mar. 12, 1885, § 24, applied—conclusiveness of judge's deed. *Biddick v. Kobler*, 110 Cal. 191 (42 Pac. Rep. 578).

Sec. 645. Grants to railroads. One who acquires a right in public lands having notice that the same have been previously appropriated by a railroad company for its right of way under the "Land-Grant Act" of March 3, 1857, holds subject thereto. *Tuttle v. Chicago, St. P. M. & O. Ry. Co.*, Minn. (63 N. W. Rep. 618). Act Cong. July 1, 1862, construed—grant of lands to Union Pacific Ry. Co.—exceptions of mineral lands. *Adams v. Red*, 11 Utah, 480 (40 Pac. Rep. 720). For construction of Act Cong. Feb. 18, 1888, and Act Cong. Feb. 18, 1889, with reference to the rights and powers of the Choctaw Coal and Railway Co., to locate and construct a railway through Indian Territory. *United States v. Choctaw, O. & G. R. Co.*, 8 Okla. 404 (41 Pac. Rep. 729). Act Cong. July 28, 1866, applied—grant of lands to state of Kansas for the use of the St. Joseph & Denver City Railroad Co.—rights of prior preemption claimant. *Janes v. Wilkinson*, 2 Kan. App. 361 (42 Pac. Rep. 735).

Sec. 646. Preemption—Homestead. It is held that under the homestead law, the legal title to the homestead does not pass to the applicant until proof of the required five years residence and cultivation is made. Dunbar, C. J., dissenting. *Bolton v. La Camas W. P. Co.*, 10 Wash. St. 246 (88 Pac. Rep. 1043). A homestead entry made by one living a short distance from the land entered is not invalidated by this fact where the party making the same honestly believes that he is residing on the land and moves thereon as soon as he discovers his mistake. *Wormouth v. Gardner*, 105 Cal. 149 (88 Pac. Rep. 646). Under Act of Congress March 23, 1874, § 2, one who has made a United States homestead entry of land upon which he resides at that time, and has made full payment and obtained a receipt from the land office, may recover possession of a portion of the land covered by the entry held adversely by one not in privity with the United States. *Wormouth v. Gardner*, 105 Cal. 149 (88 Pac. Rep. 646). The right to enter a soldier's additional homestead given by U. S. Rev. Stat., § 2306, is assignable. *Tuman v. Pillsbury*, Minn. (63 N. W. Rep. 104). Prior to the issuance of a patent the land department has power to cancel a homestead entry. *Holmes v. State*, Ala. (18 So. Rep. 529). Act. Cong.

May 14, 1880, applied—rights of one procuring cancellation of fraudulent entry. *Reaves v. Oliver*, 3 Okla. 62 (41 Pac. Rep. 858). 20 Stat. 118, applied—timber culture entry—death of claimant. *Cooper v. Wilder*, Cal. (41 Pac. Rep. 26). Act Cong. June 1, 1874, construed—occupying claimant's rights—"color of title." *Woodruff v. Wallace*, 3 Okla. 855 (41 Pac. Rep. 857).

Sec. 647. Sale or conveyance of homestead entry. Where a person has made a homestead entry upon public land in his possession, and, in violation of the homestead act, sells and transfers the land to another, and agrees to execute and deliver to him a deed therefor, so soon as he can obtain a patent, and in attempting to avoid the provisions of the homestead act, forbidding any alienation of the land before the entry is completed, the parties sign, in pursuance of the contract of sale, a written lease for the term of three years, and the purchaser takes possession of the land and continues in possession about ten years, making lasting and valuable improvements thereon of great value, and subsequently a patent is issued to the party making the homestead entry, he cannot recover the possession from such purchaser. *McKinnis v. Scottish-Amer. Mort. Co.*, Kan. (39 Pac. Rep. 1018). A mortgage or a trust deed of land by a preemptor prior to the time of making his final proof thereon is not a grant or conveyance, within Rev. St. U. S., § 2262, providing that "any grant or conveyance which he may have made except in the hands of a *bona fide* purchaser for valuable consideration, is null and void except as provided in § 2288." *Wilcox v. John*, 21 Colo. 867 (40 Pac. Rep. 880).

Sec. 648. Exemption of homestead lands from debts of patentee. Lands acquired under the federal homestead law are forever exempt from liability for the debts of the patentee created before the issuing of the patent; and this, although the patentee conveys the lands, and afterwards reacquires the title. *Brandhoefer v. Bain*, 45 Neb. 781 (64 N. W. Rep. 213). The court say: "This land was entered by the plaintiff as a homestead under the federal law, and the debt upon which the judgment was rendered was one created before the patent was issued. Section 2296, Rev. St. U. S.,

provides that 'no lands acquired under this act shall in any event become liable to the satisfaction of any debt or debts contracted prior to the issuing of a patent therefor.' The validity of this act of congress has been determined beyond question, and we refer to one case on the subject merely for the purpose of calling attention to the reason of the act. In *Seymour v. Sanders*, 8 Dill. 427, Fed. Cas. No. 12,690, it is said that congress has plenary power over the disposition of public lands, to dispose of them at such time, in such manner, and for such purposes as, in its judgment, it may deem best, and that the object of section 2296 is to benefit the poor man, who is unable to pay for the land at once, and receive his title without condition, congress conceiving that the creditor in such cases has no equity to subject to the payment of his debt lands which had been given to the debtor by the bounty of the government. The state courts have uniformly given effect to the provision by holding that judgments rendered for debts contracted prior to the patent are not dormant liens, to become valid when the entryman shall convey the land, but, on the contrary, that the provision referred to is a condition, attached to the grant of the land, which inures, not only in favor of the patentee, but in favor of his grantees. *Smith v. Steele*, 18 Neb. 1 (12 N. W. Rep. 880); *Baldwin v. Boyd*, 18 Neb. 444 (25 N. W. Rep. 580); *Jean v. Dee*, 5 Wash. 580 (32 Pac. Rep. 460); *Sorrels v. Self*, 43 Ark. 451; *Miller v. Little*, 47 Cal. 848; *Russell v. Lowth*, 21 Minn. 167 (18 Am. Rep. 389); *Gile v. Hallock*, 33 Wis. 523. * * * The courts have not regarded this act merely as one of exemption, simply staying the hands of the officers so long as the land is retained as a homestead, but, on the other hand, they have always treated it, not as an exemption, strictly speaking, but as a reservation or condition in the grant itself, whereby, acting under its sovereign authority, in the disposal of its public land, the federal government has refrained from conveying the land in such a manner as to subject it to the payment of this particular class of debts. No lien for such a debt ever attached to the land during the patentee's original tenure, or while it remained in his grantees, and we can perceive no sound reason why, when he became reinvested with the title, a lien should then, for the first time, attach. It is said that when the entryman has been

protected in the possession of the land so long as he retains it as his homestead, and when he is permitted to dispose of it for full value without subjecting it to the debt in the hands of his grantee, he has received the full benefit of the exemption, and he should not be entitled to claim the exemption, should he become reinvested with the title. This argument has force, but we do not think that it should prevail against the strong language of the exempting statute, and the manifest object to make the land, not merely temporarily exempt from execution, but to grant it absolutely and forever free from liability. Our conclusion is that a particular tract of land acquired under the federal homestead law is forever exempt from liability for the debts of the patentee created before patent issued; and this without regard to whether he remains the owner, or regains the ownership." Under this statute lands acquired as a homestead are not liable for a debt contracted after final proofs were made by the applicant and a receipt entitling him to a patent was issued, but before the issuance of the patent. *Barnard v. Boller*, 105 Cal. 214 (88 Pac. Rep. 728). For a case with annotations on this subject, see 3 Ballards' Annual, §§ 378-380.

Sec. 649. Patents—Issue to heirs of claimant. Where a land patent is issued to the heirs of a person who made the entry, the courts should decide to whose benefit it should inure. U. S. Rev. Stat., § 2269, construed. *Cooper v. Wilder*, Cal. (41 Pac. Rep. 26). The court say: "It was held at a comparatively early day that where a patent was issued to a man's "legal representatives," or to his "heirs," it was the intention of the land department to leave the question open to inquiry in the proper court as to the party to whom the patent should inure. The land department is not usually in a position to inquire into and settle the rights and equalities of claimants under the patent, and cannot properly adjust such rights. *Page v. Hogan*, 2 Wall. 605; *Weeks v. Railroad Co.*, 78 Wis. 501 (47 N. W. Rep. 737); *Meador v. Norton*, 11 Wall. 442; *Simmons v. Wagner*, 101 U. S. 260; *Cornellius v. Kessel*, 53 Wis. 395 (10 N. W. Rep. 520), and affirmed by the supreme court of the United States in 128 U. S. 456 (9 Sup. Ct. Rep. 122)."

Sec. 650. Erroneous issue of patent—Equitable relief. In the recent case of *Janes v. Wilkinson*, 2 Kan. App. 361 (42 Pac. Rep. 735), the court say: "If a patent has been erroneously issued, through fraud, mistake, or wrong views of the law, to one party, when another was legally entitled to it, a court of equity may grant relief by adjudging the legal title conveyed by the patent to be held in trust for one who has the better right to it. *Railway Co. v. Noyes*, 25 Kan. 340; *Johnson v. Townsley*, 18 Wall. 72-85; *Shepley v. Cowan*, 91 U. S. 380; *Steel v. Refining Co.*, 106 U. S. 447 (1 Sup. Ct. Rep. 389). Or the patent may be canceled at the suit of the government. But an innocent purchaser of the title will be protected even against the government. *U. S. v. Burlington & M. R. R. Co.*, 98 U. S. 334; *Colorado Coal & Iron Co. v. U. S.*, 128 U. S. 807 (8 Sup. Ct. Rep. 131); *U. S. v. California & O. Land Co.*, 148 U. S. 31 (13 Sup. Ct. Rep. 458); *U. S. v. Winona & St. P. R. Co.*, 15 C. C. A. 96, 67 Fed. 948. But by no proceeding, either in law or in equity, can a mere voidable title be questioned or set aside on behalf of one who does not show in himself a superior equitable or legal title. A mere trespasser or intruder upon the premises has no standing in court for any such purpose. One may invoke the relief which a court of equity can give in such cases only upon the ground that he has a legal right to the title if the voidable title were out of the way. It is not sufficient for him to rely merely upon the fact that the title was improperly awarded to the grantee named in the instrument of conveyance. *Eaton v. Giles*, 5 Kan. 24; *Burham v. Starkey*, 41 Kan. 604 (21 Pac. Rep. 624); *Ard v. Pratt*, 43 Kan. 419 (23 Pac. Rep. 646); *Stark v. Starrs*, 6 Wall. 402-418; *Wirth v. Branson*, 98 U. S. 118; *Steel v. Refining Co.*, 106 U. S. 447-454 (1 Sup. Ct. 389); *Bohall v. Dilla*, 114 U. S. 47 (5 Sup. Ct. Rep. 723); *Lee v. Johnson*, 116 U. S. 48 (6 Sup. Ct. Rep. 249)."

Sec. 651. Conclusiveness of patent. A patent duly issued by the United States is conclusive evidence in the state courts that the land was subject to patent. *Irvine v. Tarbot*, 105 Cal. 237 (38 Pac. Rep. 896). A land patent, valid on its face, cannot be collaterally attacked by one whose only claim to the land is possession, by showing that the land was not

of the character for which it was patented. *Dreyfus v. Badger*, 108 Cal. 258 (41 Pac. Rep. 279). A patent is not conclusive evidence of title, and one who is in possession of lands sold to him by the state, having paid the purchase price, and complied with all the requirements of the law in reference to the purchase of such lands, may maintain an action to quiet his title against one holding under a prior patent issued without authority. *Richards v. Griffith*, 1 Kan. App. 518. (41 Pac. Rep. 196). The court say: "A patent is but evidence of a grant, and the officer who issues it acts ministerially, and not judicially. If he issues a patent for land where he has no authority, the patent is void. *U. S. v. Stone*, 2 Wall. 585; *Railway Co. v. Pracht*, 30 Kan. 67 (1 Pac. Rep. 319); *Strak v. Starr*, 6 Wall. 409; *Railway Co. v. Gordon*, 41 Mich. 428 (2 N. W. Rep. 648)." It is held that where a United States patent has been granted to a mining claim it is conclusive of the sufficiency of the location notice; that the discovery and location, the marking and bounding, so that the claim may be identified and its lines readily traced, the notice and the work and labor to be performed—are all matters that come before the land department, and are conclusively adjudicated therein. The department supervises the issuance of the patent. It is a special tribunal, created for that purpose; and, within the scope of its jurisdiction, its adjudications are final and conclusive. Before a mining claim patent can issue, it must be established in the land department by competent evidence that there has been a discovery within boundaries of the claim, and a notice and location according to law; that the necessary work has been done, and that all preliminary and precedent acts have been performed, which authorize and justify the issuance of the patent. *Chambers v. Jones*, Mont. (42 Pac. Rep. 758).

Sec. 652. Patents—Miscellaneous notes. Delivery and recording of a patent is not necessary. *Sayward v. Thompson*, 11 Wash. St. 706 (40 Pac. Rep. 379). Where the right to a patent exists in several persons as co-tenants a part of whom procure a patent in their own name, they hold as trustees for the other co-tenants. *Brundy v. Mayfield*, 15 Mont. 201 (38 Pac. Rep. 1067). One who acquiesces in the

cancellation by the land department of his declaratory statement to preempt land, and takes no steps to contest the prior application of another which subsequently ripens into a patent, has no status from which to hold such patentee as his trustee. *Dreyfus v. Badger*, 108 Cal. 258 (41 Pac. Rep. 279). Where, under a patent from the United States, a state acquires title to a section of land partly within and partly without a meander line of a stream covering part of the land, and the dry land in the section without the meander line is called a lot, and numbered, and there is nothing in a patent from a state which conveys the land, by its government number and section, to indicate that it was intended to bound the lot by the meander line the patent from the state will convey the whole of the lot, to the opposite section line. *Tolleston Club v. State*, 141 Ind. 197 (40 N. E. Rep. 690).

Sec. 653. Construction of local statutes. California curative acts of 1870 and 1872 construed and applied. *People v. Harrison*, 107 Cal. 541 (40 Pac. Rep. 956). Cal. Act April 9, 1861 (Stat. 1861, p. 140), construed and applied—forfeiture of certificate of purchase of lands from the state for non-payment. *Pioneer Land Co. v. Maddux*, 109 Cal. 688 (42 Pac. Rep. 295). One who purchases from another to whom a patent has been issued absolutely under Cal. Pol. Code, § 3519, is not chargeable with notice that the latter held such patent as the attorney for another. *Marshall v. Farmers Bank*, Cal. (42 Pac. Rep. 418). La. Code Prac. Arts. 829, 880; Act 1888, No. 106, construed and applied—issue of patents by register of land office under contract of state which has been repealed by statute. *State v. Lanier*, 47 La. 110 (16 So. Rep. 647). Minn. Gen. Stat. 1894, §§ 4011, 4012, construed—sale of timber from state lands. *State v. Shevlin-Carpenter Co.*, Mich. (64 N. W. Rep. 81). Rev. Stat. 1879, § 671, construed and applied—sale and conveyance of county lands by a court commissioner—sufficiency of conveyance—seal. *Alt v. Stoker*, 127 Mo. 466 (30 S. W. Rep. 132). Ohio Laws Vol. 23, p. 57; Vol. 60, p. 44, construed and applied—title of state in canal lands—rights of corporation under grant thereof. *State v. Pittsburgh, C. C. & St. L. Ry. Co.*, 53 O. St. 189 (41 N. E. Rep. 205). Hill's

Ann. Ore. Laws, § 3600, applied—application to purchase. *Shively v. Pennoyer*, 27 Ore. 33 (39 Pac. Rep. 396). Tex. Act July 14, 1879, as amended by act 1881, applied—invalidating entry by change of survey. *Thompson v. Langdon*, 87 Tex. 254 (28 S. W. Rep. 931). Sayles' Tex. Civ. Stat. Arts. 3976a, 3976b, 4023a, construed and applied—sale of state lands—university endowment fund. *Snyder v. Compton*, 87 Tex. 374 (28 S. W. Rep. 1061). Tex. Act Apr. 9, 1881, Feb. 2, 1883, construed and applied—grant of land certificates to persons disabled in the service of the Confederate States. *Dawson v. McLeary*, 87 Tex. 524 (29 S. W. Rep. 1044). Tex. Act Dec. 15, 1863, construed and applied—donation of land to encourage erection of machinery. *Dawson v. McLeary*, 87 Tex. 524 (29 S. W. Rep. 1044). Tex. Act Feb. 8, 1850, construed and applied—appointment of commissioners to investigate titles to land lying between the Rio Grande and Nueces. *Baldwin v. Goldfrank*, 88 Tex. 249 (31 S. W. Rep. 1064). Sayles' Early Tex. Laws, Vol. 2, Art. 1748 and Act Dec. 14, 1837, construed and applied—power of county courts to issue land certificates. *Davis v. Bargas*, 88 Tex. 662 (32 S. W. Rep. 874).

Sec. 654. Miscellaneous notes. Grants by the government of lands bordering on non-navigable waters, the meander lines of which are given in the survey, pass title to the thread of such waters, and not simply to the meander lines. *Tolleston Club v. State*, 141 Ind. 197 (40 N. E. Rep. 690). A claimant of public lands acquires no vested rights, as against the United States, until all the prerequisites for the acquisition of the title have been complied with. *City of Guthrie v. Beamer*, 3 Okla. 652 (41 Pac. Rep. 647). One who presents a fraudulent land claim to the court of private land claims, under Act Cong. Mar. 3, 1891, is guilty of a violation of U. S. Rev. Stat., § 5438, making it unlawful for one to knowingly present a false, fictitious or fraudulent claim against the United States to any officer thereof for payment or approval. *In re Peraltareavis*, N. M. (41 Pac. Rep. 538). Lands subject to equitable claims within the territory acquired by the United States from Spain under the treaty of 1819, requiring survey and confirmation by the

United States, are, until the approved survey, confirmation, or patent issued, part of the public domain. Hence, until surveyed and confirmed to the claimant by act of congress referring to the survey or patent issued, no prescription runs against him. *Perkins v. Vincent*, 47 La. 579 (17 So. Rep. 126). Act Cong. Feb. 18, 1871; May 27, 1880; Aug. 7, 1882, construed and applied—title of the state of Ohio obtained by the cession to it of the “unsurveyed and unsold” lands in the Virginia military district. *Board of Trustees v. Cuppett*, 52 O. St. 567 (40 N. E. Rep. 792). Act Cong. Feb. 25, 1885, applied—unlawful fencing of public lands. *United States v. Elliott*, 12 Utah, 119 (41 Pac. Rep. 720). In Texas it is held that the assignment of a land certificate by one having title, although made after a patent has issued, conveys to the assignee an equitable title. *Hume v. Ware*, 87 Tex. 380 (28 S. W. Rep. 935). For construction of a particular assignment of the rights of a location of land, see *Threadgill v. Bickerstaff*, 87 Tex. 520 (29 S. W. Rep. 757). For construction of Spanish land grants, see *Howell v. Hanrick*, 88 Tex. 383 (29 S. W. Rep. 762); *Howell v. Hanrick*, 88 Tex. 383 (31 S. W. Rep. 611). Location of headright certificate. *Smith v. Estill*, 87 Tex. 264 (28 S. W. Rep. 801).

QUIETING TITLE.

EPITOME OF CASES.

Sec. 655. As to when the action will lie. An action to quiet title may be maintained against a lease which has become void on account of the lessee's failure to comply with its conditions. *Woodward v. Mitchell*, 140 Ind. 406 (39 N. E. Rep. 437). As to when a bill in equity to quiet title may be maintained in the United States court, see case reported in Vol. 1, §§ 352–354. As to when title to an easement may be quieted, see Vol. 2, §§ 520–522 and *note*. An action to quiet title will lie to prevent a threatened illegal sale of the property on execution. *Young v. First Nat. Bank*, Ida.

(89 Pac. Rep. 557). One whose title depends upon the statute of limitations, may, by petition, have his title established under the burnt record act. *Miller v. Stalker*, 158 Ill. 515 (42 N. E. Rep. 79). One whose title is clouded by a void judgment may sue to set it aside. *Truesdail v. McCormick*, 126 Mo. 89 (28 S. W. Rep. 885). One who has executed a bond for a deed and placed his obligee in possession may maintain an action to set aside an invalid tax sale of the land as a cloud on his title. *Langlois v. Stewart*, 156 Ill. 609 (41 N. E. Rep. 177). In California it is held that a vendor who has placed his vendee in possession and given a deed *in escrow*, to be delivered when the last payment of the purchase money is made, has sufficient title to maintain an action to quiet title until the condition of the *escrow* is performed, § 738, Code Civ. Proc., providing that possession is not necessary to the maintenance of the action. *Heney v. Pesoli*, 109 Cal. 53 (41 Pac. Rep. 819). In Illinois it is held that a judgment creditor who has acquired title by sheriff's deed may maintain suit to quiet title and have decreed null and void a fraudulent conveyance of his debtor made prior to the levy of the execution. *Phillips v. Kesterson*, 154 Ill. 572 (39 N. E. Rep. 599). The court say: "The rule that a bill to quiet title and remove cloud lies only where complainant is in possession of the land has no application where a deed is sought to be set aside for fraud."

Sec. 656. Owner of equitable title may maintain the action. It is held that an action to quiet title may be maintained by the owner on an equitable right. *Tuffree v. Polhemus*, 108 Cal. 670 (41 Pac. Rep. 806). The court say: "There are cases in this state holding that the possessor of equitable title cannot bring an action to quiet such title against the holder of the legal title. *Von Drachenfels v. Doolittle*, 77 Cal. 265 (19 Pac. Rep. 218); *Nidever v. Ayers*, 83 Cal. 39 (23 Pac. Rep. 192); *Bryan v. Tormey*, 84 Cal. 126 (24 Pac. Rep. 319); *Harrigan v. Mowry*, 84 Cal. 456 (22 Pac. Rep. 658); and this is the general doctrine, *Frost v. Spitley*, 121 U. S. 552 (7 Sup. Ct. Rep. 1129). But, as this court in the past has had occasion to remark, § 738 of the Code of Civil Procedure is broad in its terms. It possesses no limitations,

or restrictions, and we see no reason why it does not vest in the holder of an equitable title the right to come before the court, and have his equities declared superior to any and all opposing equities. If there are outstanding and antagonistic equities, we know of no sound policy which would deny claimants thereunder an adjudication upon them by virtue of the provisions of this section of the code. In *Watson v. Sutro*, 86 Cal. 500 (24 Pac. Rep. 172), it was held that the owner of an equitable interest was entitled to have his interest set aside in partition, and we repeat with approval what is there said as to this class of estates: 'In fact, in most cases in this state the difference between equitable and legal estates is of no practical importance. They are both estates originating by law, and held under law, and in that sense are legal estates; and where a court is at liberty to rely upon the rule of equity of considering that as done which ought to be done, the difference between an estate so regarded and an estate at law is not worthy of consideration.' It is apparent at a glance that, if an action for partition will lie in such a case, then an action by the holder of an equitable title against parties claiming adverse equities should be recognized and countenanced under the foregoing section of the code."

Sec. 657. As to when possession of plaintiff is necessary. In Maryland it is held that the jurisdiction of a court of equity cannot be maintained to quiet title to remove a cloud unless the party has the legal title and the possession. If the possession is in another his remedy is by an action of ejectment. *Helden v. Hellen*, 80 Md. 616 (81 Atl. Rep. 506; 45 Am. St. Rep. 371). Under Cal. Code Civ. Proc., § 738, possession of land is not essential to the right to maintain an action to quiet title. *Heney v. Pesoli*, 109 Cal. 53 (41 Pac. Rep. 819). One out of possession and having only an equitable title to land may maintain an action against one in possession for the purpose of removing a cloud upon his title. *Brown v. Wilson*, 21 Colo. 309 (40 Pac. Rep. 688). In Florida it is held that where land is not wild or uncultivated it is essential that the complainant in a bill to remove a cloud upon the title to real estate should be in possession in order to maintain the action. *Winn v. Strickland*, 34 Fla. 610 (16

So. Rep. 606); *Levy v. Ladd*, 35 Fla. 391 (17 So. Rep. 635); *Woodford v. Alexander*, 85 Fla. 388 (17 So. Rep. 658). In Kentucky it is held that as a general rule in order to maintain an action to quiet title, the plaintiff must have both title and possession, but when the title is wrongfully wrested from the owner and converted to the use of another, an action may be maintained to cancel the conveyance and quiet title when the plaintiff is not in possession. This rule is granted on the ground that otherwise the wrong would be remediless. *Packard v. Beaver, V. L. & M. Co.*, 96 Ky. 249 (28 S. W. Rep. 779).

Sec. 658. As to what is a cloud upon title. Where a board of county commissioners, in a proceeding for the establishment of a road, make an order under § 4709 of the Ohio Rev. Stat. directing the petitioners to pay a landowner, in certain payments, at certain times, the amount awarded him as compensation for land taken, and that the road be not opened until the payments are made, a failure to make the payments as directed, on demand of the land owner, terminates the right to open the road; and in such case the landowner may maintain an action for the vacation of the order establishing the road as a cloud on his title; and also, in such case, the petitioners for the road are the proper parties defendant. *Lowmiller v. Fouser*, 52 O. St. 123 (39 N. E. Rep. 419). The grantee in a conveyance from a mortgagor after foreclosure acquires only the right to redeem within the statutory time and if he fails to make such redemption his deed does not even constitute a cloud upon the title by virtue of such foreclosure. *Spraker v. Jenners*, 140 Ind. 688 (40 N. E. Rep. 117). In a recent case the authorities are collated and it is held that a judgment which was only an apparent lien on a homestead was a cloud, and that an action would lie to remove it so long as the land was used for a homestead. *Cory v. Schuster*, 44 Neb. 269 (62 N. W. Rep. 470). A deed or other instrument purporting to convey land that shows on its face that the grantors therein were out of possession of the land granted at the time of its execution, and that such land at the time was adversely held by another, is void upon its face, as to such adverse occupant, and as to him, does not create such

a cloud upon his title as will authorize the interposition of a court of equity on his behalf for its removal. *Reyes v. Middleton*, 86 Fla. 99 (17 So. Rep. 987; 51 Am. St. Rep. 17; 29 L. R. A. 66).

Sec. 659. Parties. In a suit in equity, brought to remove a deed held by the defendants as a cloud upon plaintiff's title to the land in question, in which the bill alleges that the defendants' immediate grantor, who claimed to have purchased the land at a judicial sale under a decree, had no title, because no sale of such land was ever decreed in any legal proceedings such as are recited in said grantor's deed, and that no sale of said land, or of any interest therein, was ever decreed in any legal proceedings set up in said pretended deed, and that no legal sale of said land, or of any interest therein, was ever made by the special commissioner who made the deed to the defendant's grantor, such grantor should be made a party defendant to the suit; and a decree pronounced in his absence, or, in case of his death, in the absence of his heirs at law, should be set aside. *Hitchcock v. Hitchcock*, 89 W. Va. 607 (20 S. E. Rep. 595). A grantor under whom both parties claim is not a necessary party to an action to quiet title. *Independent School Dist. No. 3 v. Gunn*, Ia. (61 N. W. Rep. 417).

Sec. 660. Pleading. A party will not be permitted to allege in his petition one cause of action and prove another upon trial. *Omaha Consol. V. Co. v. Burns*, 44 Neb. 21 (62 N. W. Rep. 301). An averment in a petition to quiet title and declare void a tax deed that "there was no legal and sufficient levy of the taxes," is a mere conclusion and presents no issue. *Weston v. Meyers*, 45 Neb. 95 (63 N. W. Rep. 117). Where the plaintiff is not entitled to possession the complaint to quiet title must show the nature of his interest or title and that it is consistent with the right of possession in another, and if the complaint sets out specifically the plaintiff's source of title no other source can be proven. *Pittsburg, C. C. & St. L. Ry. Co. v. O'Brien*, 142 Ind. 218 (41 N. E. Rep. 528). In an action to quiet title against the legal representative of a decedent against whom the plaintiff had recovered a judgment for possession, it is not necessary that such judgment be

pleaded in order to be introduced in evidence. *Riverside L. & Irr. Co. v. Jensen*, 108 Cal. 146 (41 Pac. Rep. 40). In an action to quiet title it is held that under an allegation of ownership in fee, proof of any title including that acquired by adverse possession may be introduced. *Rogers v. Miller*, 18 Wash. St. 82 (42 Pac. Rep. 525). Where an action was brought under § 594 of the Kansas Code to quiet the title to a tract of land, and the defendants pleaded facts showing that they were tenants in common as to a one-third interest, and the plaintiff in reply admitted that the defendants held the naked legal title to the extent of one-third interest, but alleged that they had sold and received the consideration for such interest, and that a deed was given therefor by their consent by one supposed by all parties to have authority as trustee to do so, it was held that the reply did not constitute a departure from the cause of action alleged in the petition. The naked legal title to a one-third interest in real estate does not draw to the defendants the right of possession as against one having the exclusive possession under a full equitable title to the whole premises, so as to defeat the right of the latter to have his title quieted. *Neve v. Allen*, 55 Kan. 688 (41 Pac. Rep. 966). A complaint which alleges that the plaintiff "is the absolute and unqualified owner in fee simple," and that the defendant "wrongfully and without right claims an interest in said land by virtue of an alleged purchase thereof at tax sale; that said claim is unjust and wrongful, and without any foundation in law or fact; that said claim is made adversely to said ownership and title of said plaintiff"—states a cause of action under said § 5449, S. Dak. Com. Laws, without particularly setting out the facts upon which the invalidity of such certificate is claimed. It not appearing upon the face of the complaint, either expressly or by implication of law or fact, that any taxes were or are due on said land, the complaint is not subject to general demurrer on the ground that it does not contain an offer to pay whatever taxes may be found to be due on the same. *Clark v. Darlington*, S. Dak. (63 N. W. Rep. 771).

Sec. 661. Cross complaint—Pleading equitable titles. A cross complaint may be filed when its cause of

action "affects or is affected by" the original cause of action. Ky. Civ. Code, § 96, Subd. 3, construed. *Loughridge v. Cawood*, Ky. (31 S. W. Rep. 125). A cross complaint in an action to quiet title which alleges that the defendant is the owner and entitled to possession of the land and that plaintiff is in possession without right and prays for possession and damages, can properly be pleaded with a general denial. *Gillenwater v. Campbell*, 142 Ind. 529 (41 N. E. Rep. 1041). He who comes into equity to get rid of a legal title as a cloud upon his own must show clearly the validity of his own title and the invalidity of his opponent's. Equity will not act in such cases in the event of a doubtful title; and a party, to be relieved and to succeed in contests of this character, must do so on the strength of his own title, and not on the weakness of his adversary's. *Levy v. Ladd*, 35 Fla. 391 (17 So. Rep. 635). In a recent case it is held that a complaint which averred that the plaintiff was the equitable owner in fee simple and entitled to the possession of the land, and that his grantors were in peaceable adverse possession from 1837 until six years prior to the bringing of the action, at which time the defendant unlawfully took possession and since has kept plaintiff out of possession, was good on demurrer. *Carger v. Fee*, 140 Ind. 572 (39 N. E. Rep. 98). He who asks equity must do equity, and where relief is sought against a tax title acquired at an invalid sale, the plaintiff must offer to pay the amount paid out by the purchaser at such sale and the legal taxes subsequently paid on the premises. *Weston v. Meyers*, 45 Neb. 95 (63 N. W. Rep. 117).

Sec. 662. Practice. Questions of boundary may be adjudicated in an action to quiet title. *Salem Imp. Co. v. McCourt*, 26 Ore. 93 (41 Pac. Rep. 1105). On practice generally in actions to quiet title see case with annotations, Vol. 3, §§ 594-598. Under the Iowa Code, § 3275, it is held that the defendant to an action to quiet title, upon filing a disclaimer to any right, title or interest adverse to the plaintiff is entitled to recover his costs. *Deacon v. Central Iowa Inv. Co.*, Ia. (63 N. W. Rep. 678). Where the plaintiff's title is put in issue by the answer he is required to establish that at the commencement of the action he was the

owner of the legal and equitable title of the property in dispute. *McCauley v. Ohenstein*, 44 Neb. 89 (62 N. W. Rep. 232). In Minnesota it is held that in an action to determine an adverse claim where the land is vacant and unoccupied, the plaintiff must allege and prove, if it is denied, that he has some title to or interest in the land; otherwise he has no standing in court and his action must be dismissed. *Wheeler v. Winnebago Paper Mills*, 62 Minn. 429 (64 N. W. Rep. 920). Under the Pennsylvania statute, June 10, 1893 (P. L. p. 415), § 2, which provides for an action to quiet title to land by one in possession against an adverse claimant, it is held that where the answer to a petition by a tenant under a coal lease to have his title to the coal mined and severed from the land quieted as against the lessee, who claimed title thereto, admitted the lease, and, after disclaiming any dispute or denial of plaintiff's lawful rights thereunder, set up defendant's right under the lease to have plaintiff account and pay royalty for part of the coal after it had been mined, an issue was properly refused. *President, etc., of Del. & H. Canal Co. v. Genet*, 169 Pa. St. 343 (32 Atl. Rep. 559).

REAL ACTIONS.

BULLOCK v. BULLOCK.

(52 N. J. Eq. 561.)

Lands in another state—Jurisdiction in personam—Extra-territorial force in rem. The jurisdiction acquired by the courts of one state over parties to an action incidentally affecting lands in another state is jurisdiction purely *in personam*; the decree of judgment in such action cannot have any extra territorial force *in rem*. A decree or judgment of the courts of one state requiring and directing lands in another state to be conveyed or charged or otherwise disposed of may be enforced by their process, and when enforced or submitted to, by the execution of a conveyance, mortgage, or other instrument, as directed, such conveyance, mortgage, or other instrument is effective in the *situs rei*, but not the decree. The courts of the *situs* of lands are not bound by the decree of judgment of the courts of another state affecting such lands

made in an action in which their jurisdiction is purely *in personam*; for, their jurisdiction being limited, their decree and judgment can extend no further. Full faith and credit will be given to such decrees and judgments, under section one of article four of the constitution of the United States, by according to them a force merely personal upon the parties, and enforceable alone by their process.

Decrees as obligations—Enforcement of in other states. Such decrees and judgments do not create a personal obligation upon the party which the courts of another state are bound to compel him to perform. At the most, they impose a duty, the performance of which may be enforced by the process of the courts pronouncing them. The courts of the *situs* of lands cannot be compelled to issue their decrees to enforce the process of courts of another state, or the performance of acts required by the decree of such courts, ancillary to the relief thereby granted, affecting such lands. A court of New York, having jurisdiction over the action and parties, dissolved the bonds of matrimony between them, fixed the amount, and directed the payment of alimony, and ordered the husband to execute and deliver to the wife a mortgage upon lands in New Jersey, to secure the payment of the alimony. Held, that a bill founded upon the order requiring such a mortgage to be given, and praying a decree that the mortgage should be given in conformity to the order, disclosed no equity, and was properly dismissed. Van Syckel, Dixon, Lippincott, Reed, and Bogert, JJ., dissenting.

(Syllabus by-the Court.)

MAGIE, J.

Sec. 663. Statement of the case. The appellant in this cause was the complainant below. Her bill of complaint stated the following facts, viz.: That she had commenced an action in the supreme court of the state of New York, which court had "jurisdiction in the case," against respondent, her former husband, for the purpose of dissolving the marriage previously entered into by them; that respondent was personally served with process, and duly appeared in said action; that such proceedings were had thereon that a judgment was rendered in her favor, whereby it was adjudged that said marriage should be dissolved, that respondent should pay to her, as alimony, one hundred dollars on the first day of each month, commencing June 1, 1892, and should execute a mortgage as security for such payments, upon lands in the state of New Jersey, of such form and containing such provisions as the court should subsequently direct and approve; that said court, by a subsequent order, directed respondent to execute, acknowledge,

and deliver to appellant a mortgage of a specified form, and containing specified provisions upon lands in this state, which were particularly described in the order; that respondent had failed and refused to execute and deliver the mortgage as directed, and made various mortgages and conveyances of said lands without consideration, and with the fraudulent purpose of defeating appellant's rights. It was charged in the bill that appellant, by virtue of the decree and order of the New York court, acquired an equitable lien on said lands, prior to the lien and interest of the mortgagees and grantees of respondent, and an equitable right to a mortgage on said lands, in accordance with the decree and order. Upon these statements and charges, the prayers of the bill were for answer and discovery, for a decree setting aside the mortgages and conveyances of respondent, and that he be "decreed, pursuant to the said decree and order of the New York supreme court, to execute and deliver" to her "the mortgage on said premises, therein directed to be made and delivered, according to the form therein provided." There was a general prayer for relief. Respondent moved the court of chancery to dismiss the bill, pursuant to the practice established by rule 215 of that court, upon the ground that the bill exhibited no equity entitling appellant to the relief she prayed for. The notice of the motion specifically set forth the grounds of objection. The motion was heard by Vice Chancellor Bird, and, upon his advice, a decree was made dismissing the bill. The opinion of the vice chancellor is reported in 51 N. J. Eq. 444 (27 Atl. Rep. 435). From this decree appellant has prosecuted the appeal which is now to be decided. A motion to dismiss a bill, under chancery rule 215, is a substitute for a demurrer. The rule was designed to furnish a speedy mode of bringing to adjudication questions which before its adoption, could only be raised by demurrer. Obviously, all facts stated in the bill which are relevant and well pleaded must be deemed to be admitted to be true upon such motion, as upon a demurrer, of which it is the substitute. Looking at the bill to discover what facts must have been taken to be true upon the hearing of the motion to dismiss, I find difficulty in determining how extensive a jurisdiction is thereby asserted to have inhered in the supreme court of New York. It is expressly stated that the

action commenced in that court was for the purpose of dissolving the marriage of the parties, and there is a conjoined statement that the court had jurisdiction of the case. From these statements it was obviously to be assumed that the court in question had jurisdiction to decree a divorce and annul a marriage. But it is to be inferred—for there is no express averment of it—that the same court possessed jurisdiction to fix the amount and require payment of alimony, and especially to require a defendant to secure the payment of alimony by a charge upon lands lying beyond the territorial jurisdiction of the court? Alimony is, in general, an incident of divorce. It may be justifiable to infer that a court empowered to dissolve the bonds of matrimony would also be clothed with authority to determine on the amount of the alimony, and to render judgment therefor. But how, without some further averment, is an inference to be drawn that the same court was authorized to require security for the payment of alimony to be given by the mortgage of lands, and of lands beyond its jurisdiction? If, however, the bill is defective in the respect suggested, the defect was not included in the causes set out in the notice of the motion to dismiss, and no objection upon that ground was made in the court below or here. From this I think we must deem it to have been conceded that the bill properly averred the jurisdiction of the supreme court of New York to make the decree and order mentioned in the bill, and copies of which were annexed to and made a part thereof. The decree, in this respect, ordered respondent to pay to appellant the alimony, from time to time, during her natural life, and to execute and deliver to her a mortgage on his real estate, and particularly that located in the state of New Jersey, to secure such payments. The order simply required respondent to perform the decree by executing, acknowledging, and delivering to appellant a mortgage on particular lands in New Jersey, of a form shown in a schedule annexed to the order. The order and requirement of the court was therefore directed *in personam*, and there was no attempt to adjudicate or enforce an adjudication *in rem*.

Sec. 664. Land in another state—Extra-territorial force of decrees. It is scarcely necessary to observe that a

court of New York could not have been empowered to affect, by its decree or judgment, lands lying within another state; for no principle is more fundamental or thoroughly settled than that the local sovereignty, by itself or its judicial agencies, can alone adjudicate upon and determine the status of lands and immovable property within its borders, including their title and its incidents and the mode in which they may be charged or conveyed. Neither the laws of another sovereignty, nor the judicial proceedings, decrees, and judgment of its courts, can in the least degree affect such lands and immovable property. Story, *Confl. Laws*, §§ 548, 591. The concession as to the jurisdiction of the supreme court of New York in this case must therefore be deemed to be limited to a jurisdiction to proceed *in personam*, and not to extend to a determination, adjudication, or decree *in rem*. The jurisdiction thus conceded to the supreme court of New York, is exactly analogous to the jurisdiction which, since the decision of *Penn v. Lord Baltimore*, 1 Ves. Sr. 444, has been universally recognized as inherent in courts administering equity. This recognized jurisdiction extends to making decrees in cases of equitable cognizance, such as fraud, trust, and specific performance against persons brought into those courts, notwithstanding such decrees incidentally affect lands beyond the court's jurisdiction. But the exercise of this jurisdiction has been supported solely on the ground that it operated *in personam*, only, and did not extend to the utterance of decrees *in rem*. In the leading American case, Chief Justice Marshall declared that the question was whether the question presented was an unmixed question of title, or a case of fraud, trust, or contract. *Massie v. Watts*, 6 Cranch. 148. If relief cannot be effectively given by the decree *in personam*, such courts will not retain the bill. *Morris v. Remington*, 1 Pars. Eq. Cas. 387; *Lindley v. O'Reilly*, 50 N. J. Law, 636 (15 Atl. Rep. 379; 7 Am. St. Rep. 802; 1 L. R. A. 79). Nor will the power be exerted *in personam* to compel an act affecting lands in another jurisdiction of doubtful legality. *Blount v. Blount*, 1 Hawks, 365. The power of such courts to make effective such decrees is limited to its process operating upon the party such as sequestration of property within jurisdiction, attachment for contempt, and the like; it will not extend to validat-

ing a conveyance of the foreign lands, made by its master or commissioner, in default of the performance of the decree by the party. *Watts v. Waddle*, 6 Pet. 390; *Burnley v. Stevenson*, 24 Ohio St. 474 (15 Am. Rep. 621). When, by the process of the court acting upon the party, obedience to the decree is enforced by the conveyance, it is the conveyance, not the decree, that affects the lands in the foreign jurisdiction. *Davis v. Headley*, 22 N. J. Eq. 115. The long line of cases illustrating this doctrine and its limitations is collected in 22 Am. & Eng. Enc. Law, 918. Nowhere has the doctrine been more clearly stated than in our own courts. *Wood v. Warner*, 15 N. J. Eq. 81; *Davis v. Headley*, 22 N. J. Eq. 115; *Potter v. Hollister*, 45 N. J. Eq. 508 (18 Atl. Rep. 204); *Id.* 46 N. J. Eq. 609 (22 Atl. Rep. 56); *Lindley v. O'Reilly*, 50 N. J. Law, 636 (15 Atl. Rep. 879; 7 Am. St. Rep. 802; 1 L. R. A. 79). In my judgment, it does not admit of doubt that the jurisdiction of the supreme court of New York, if properly averred in the bill, was a jurisdiction to make a decree as to alimony, and its being secured by mortgage on lands in New Jersey, only *in personam*, and to enforce it by any process against respondent which is proper in that state. Nor was the decree which was pronounced by that court capable of any other construction than one which shows it to have been within such conceded jurisdiction. From these considerations, I deem it evident that the theory of this bill that, by virtue of the decree and order of the supreme court of New York, appellant acquired an equitable lien on lands in New Jersey, and a right to have such lands disposed of in a certain manner, cannot be sustained without a disastrous violation of fundamental principles. The decree and order of that court do not pretend to have any such purpose or effect, nor could that court be empowered to make a decree having such an effect.

Sec. 665. Decrees as obligations—Enforcement of in other states. But it is ingeniously contended in this court that the decree and order of the supreme court of New York imposed upon respondent a personal obligation to do what that decree and order had directed him to do, and that a court of equity in New Jersey ought to compel him to perform that obligation, as it would compel him to perform his contract to

convey or mortgage lands in its jurisdiction. Moreover, it is contended that the provisions of § 1, of article 4 of the constitution of the United States, requiring full faith and credit to be given in each state to the records and judicial proceedings of every other state, impart to this decree and order a conclusive force, with respect to the mortgage directed to be given on lands here, which compels our courts to enforce it by decrees in conformity therewith. Doubtless, the judgment of the New York court must be accorded in our courts a conclusive effect in certain respects. Thus, it has conclusively determined the status of the parties to that action, and that the marital relation previously existing between them has been absolutely dissolved. If, by the direction to pay alimony, an indebtedness arises from time to time as such payments become due, an action at law would lie thereon, and the decree would furnish conclusive evidence of such indebtedness. But the question upon the solution of which this case must turn is whether the courts of New Jersey must give conclusive effect to the decree or judgment of the courts of New York made in a case where they had acquired jurisdiction of the parties, but affecting lands situated here, and disposing of the title thereto in whole or in part. If this question is to be answered in the affirmative, it seems evident that we accord jurisdiction over lands in New Jersey to the courts of other states, and as was said by Chancellor Zabriskie in *Davis v. Headley*, 22 N. J. Eq. 115, "leave to the courts of this state only the ministerial duty of executing their decree," for the doctrine that jurisdiction respecting lands in a foreign state is not *in rem*, but only *in personam*, is bereft of all practical force if the decree *in personam* is conclusive, and must be enforced by the courts of the *situs*. If such is the effect which must be given to the judgments and decrees of the courts of a sister state respecting lands situated here, it is extraordinary that no trace of the doctrine can be found in text-books or in adjudicated decisions. My researches have not disclosed any support of the doctrine by any text writer of repute or by any decision in point. The very industrious counsel who maintained this view in argument has produced no authority which, in my judgment, sustains his position. In *Institution v. Gerber*, 85 N. J. Eq. 151, the question was as to the effect to be attributed by our

courts to an order of a court of New York directing a New Jersey corporation to pay money due from it to one Ahern, in part satisfaction of a judgment which the savings institution had recovered against Ahern in New York. The decision of this court went upon the ground that the New York court had not acquired jurisdiction of the New Jersey corporation which had been ordered to pay, and that its order was consequently void. What was said by the learned chief justice who wrote the opinion respecting the power of our court of chancery to enforce a right to money under such an order was unnecessary to the decision, but can doubtless be supported, because the New York order was for the payment of money raising an indebtedness, which in that case required to be enforced in the court of chancery, as the debt, which was the subject of the order, had then been paid into that court. But the effect of a foreign judgment or decree as to money in another state must differ from the effect of such a judgment and decree as to lands in another state. *Cheever v. Wilson*, 9 Wall. 108, presents a closer parallel to the case in hand. In that case a divorce court in Indiana made an order that one of the parties to an action for divorce should pay to the other party a certain proportion of the rents to accrue from real estate situated in the District of Columbia, and should execute to him a sufficient power to collect such rent. She executed the power as prescribed, and the question before the court was what interest in the rents passed thereby. Mr. Justice Swayne, delivering the opinion of the court, incidentally said that the order "could have been enforced in the *situs rei* by proper proceedings, conducted there for that purpose." But this statement is not supported by the cases cited, and was unnecessary to the decision, as the learned judge immediately pointed out, by showing that the party had executed an assignment which vested in the other party the interest in the rents which she had been ordered to convey. The whole question was as to the effect of that assignment. The contention that such an order requiring lands in New Jersey to be charged with alimony created a personal obligation on respondent is, in my judgment, without force. It is a misuse of terms to call the burden thereby imposed on respondent a "personal obligation." At the most, the decree and order imposed

a duty on him, which duty he owed to the court making them. That court can enforce the duty by its process, but our courts cannot be required to issue such process, or to make our decrees operate as process. Moreover, the substantial part of the decree is comprised in the dissolution of the marriage and the direction to pay alimony. The charge of the alimony upon lands is rather in the nature of process to enforce the substantial decretal order for alimony. The establishment of the contrary doctrine would result in practically depriving a state of that exclusive control over immovable property therein which has always been accorded. For example, by our statutes, contracts respecting lands to be enforced must be entered into and evidenced in a particular mode; but our courts, upon equitable grounds, sometimes enforce contracts that are without the statute. It is the province of our legislature to prescribe the rule for such contracts, and for our courts to construe the rule so prescribed, and to determine when such contracts, whether within or without the statute, may be enforced. It is true that the courts of another state, proceeding *in personam* to enforce a contract for lands in New Jersey, would be bound to determine whether the contract was enforceable under our laws. But they would construe those laws, and if their decree *in personum* may and must be conclusive in our courts, and compel a decree in conformity therewith, it is obvious that the contract will be enforced according to whatever construction the foreign court put upon our laws, and not according to the construction of our own courts. Other examples will occur to any one considering the subject. For these reasons, I shall vote to affirm the decree below. Dixon, Lippincott, Reed and Bogert, JJ., dissenting.

Concurring Opinion.

GARRISON, J.

Sec. 666. As to what is a "judgment" within the meaning of the federal constitution. I concur in the result announced by Mr. Justice Magie, but not for the reasons contained in the opinion just read, nor for those stated in the conclusions of the learned equity judge who heard the cause in the court of chancery. The object of the complainant's bill is to execute, through the medium of our court of chancery, an

order made by the supreme court of New York upon defendant to secure his performance of a decree rendered therein against him by mortgaging his lands in New Jersey. The procedure in this state is justified under that provision of the federal law that gives conclusive force in one state to the records and judicial proceedings of another. The vice of the deduction in the case before us is that it assumes that the order made by the New York court to secure the performance by the defendant of its decree against him is a "judgment" of that state, within the meaning of the federal constitution and the act of congress. The transcendent force given by the federal law to the judicial proceedings of sister states is confined to such judicial determinations as possess the quality of judgment; it does not extend to proceedings in the nature of execution, or to orders merely ancillary to some special form of relief. In cases that proceed to judgment in common-law form this distinction is well marked, but it is liable to be lost sight of in decisions rendered in equity causes, where judgment, in decretal form, is often accompanied by special orders for particular forms of relief, or for the enforcement or securing of the execution of the decree pronounced. The distinction, however, is always a substantial one, that must not be overlooked because of the form in which the decretal order may be framed.

That only is judgment that is pronounced between the parties to the action upon the matters submitted to the court for decision. To judgments thus rendered, the federal law accords in every state the same conclusive force possessed in the state where they are rendered. After judgment in a state court, all that follows for the purpose of enabling the successful party to reap the benefits of the determination in his favor is execution, or in aid of execution. No interpretation has ever been placed upon the federal constitution giving conclusive effect, or, indeed, any effect at all, to the executions of the judgments rendered in sister states, or to any order merely in aid thereof. Such orders lack the quality of judgment, and must be differentiated from judgments, even though embodied in the same decretal orders that pronounce the judgment of the court. These decretal orders may be defined to be decis-

ions made touching some matter collateral to the issue presented in the record, or required to be passed upon in order to carry into execution the judgment of the court. To these determinations ancillary to execution no extra-territorial force is given by the federal law. That the order in the present case touching the defendant's land in New Jersey is of this nature clearly appears in the case before us. Upon this demurrer it is established that the New York suit was instituted for the sole purpose of dissolving the marriage of the complainant with the defendant? Upon the record thus submitted, the supreme court of New York pronounced as its judgment that the marriage should be dissolved with the incident of alimony to the complainant. Here the sentence of the law upon the record ceases. The order of the court then proceeds in these words: "And it is further adjudged and decreed that the said defendant, within ten days after the entry of this judgment and service thereof on the attorney for the defendant, execute and deliver unto the plaintiff a mortgage covering the real property owned by the defendant, and particularly located in the state of New Jersey, which mortgage shall be of such form and contain such provisions as shall be sufficient and requisite to secure unto the plaintiff the faithful performance of the provisions of this judgment and decree on the part of the defendant, as may be directed and approved by this court." In my opinion, this order was ancillary to execution, and did not possess any element of a judgment upon the issue submitted to the court for decision, which was whether the marriage between the parties should be dissolved. For this reason, I think the complainant's bill was properly dismissed.

Dissenting Opinion.

VAN SYCKEL, J.

Sec. 667. Presumptions as to power of courts. The supreme court of New York made a decree for divorce in favor of the wife, and ordered that the husband pay one hundred dollars per month alimony, and that, to secure it to the wife, he should execute a mortgage on lands which he owned in New Jersey. Personal service was made upon the husband in the New York divorce suit, and the decree for divorce, including the order to execute the mortgage, was obtained on

the 1st day of July, 1892. On the 19th of November, 1892, on the application of the wife's attorney, an order was entered in the New York court specifying the land in New Jersey upon which the husband should execute the mortgage. Thereupon the wife filed a bill in the court of chancery of this state to compel the husband to execute the mortgage in accordance with the New York judgment, and also to set aside conveyances of the property in this state by the husband, which are alleged to be fraudulent. The first question is whether the New York court, on common-law principles, had the power to decree a mortgage to be executed to secure the wife's alimony. The ecclesiastical courts had no such power. These courts enforced their decrees by excommunication until an act was passed (53 Geo. III, c. 127) forbidding excommunication, and providing imprisonment for contumacy in its stead. The power of the New York court, if it exists, must be statutory. Prior to the judgment, the presumption, in the absence of proof, would be that the common law prevailed, and that no such power rested in the New York court. But, after judgment, the presumption will be that all things were rightly done, and that the power did exist by statute in New York. This presumption will prevail until evidence is produced to repel it. In this case there is an entire absence of proof on this point. Admitting this to be so, the judgment in New York constitutes no lien upon lands in this state. *Davis v. Headley*, 22 N. J. Eq. 115; *Lindley v. O'Reilly*, 50 N. J. Law, 636 (15 Atl. Rep. 379; 7 Am. St. Rep. 802; 1 L. R. A. 79).

Sec. 668. Decrees as obligations—Enforcement in other states. But this does not dispose of the case. The question is whether our court of equity will establish a lien upon the New Jersey lands, so as to give effect to the New York decree. It may be conceded that the *lex fori* must apply to the remedy to enforce the New York judgment in our courts. *Harker v. Brink*, 24 N. J. Law, 333; *Garr v. Stryker*, 16 N. J. Law, 404; *Armour v. McMichael*, 36 N. J. Law, 92. While we will give full faith and credit to the New York judgment, we cannot be asked to give greater efficacy to a decree for alimony made in New York than we can give to

a like decree made in our own courts. For instance, if the common law prevailed here, we would enforce the New York decree for alimony only according to the common-law practice, for that would exhaust our power in that respect. Under our statute concerning alimony, it has been held that equity may decree that it shall be a lien upon the husband's lands. *Snover v. Snover*, 18 N. J. Eq. 261. I do not find that a decree has been made expressly requiring the husband to execute a mortgage, but it is not necessary here, as the decree that it shall be a lien by its own force attaches to the land. It is a difference in mere form, not in substance. The right to establish the lien must carry with it the power to require the husband to execute any conveyance requisite to its enforcement. The question to be solved, therefore, is whether, under that provision of the federal constitution which requires that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state, the wife is entitled to invoke the aid of our courts to give effect to the New York judgment in conformity to our practice. It is undoubtedly true that the New York court had no power to create a lien upon New Jersey lands, and it is also true that the New York court could have acted upon the person of the husband while within its jurisdiction, and constrained him to execute such a writing as would have been effective to pass the title to, or establish a lien on, the New Jersey lands. The question, however, is not what the New York court could have done, but what the courts of New Jersey, in discharge of her constitutional obligations, should do in aid of the wife after rendition of the judgment in New York. The New York court having jurisdiction of the person in the husband, and also of the subject-matter of the suit there, the judgment in that state, as between the parties to that suit, was conclusive of the right of the wife to have the husband execute a mortgage upon the New Jersey lands, although it did not of its own force create a lien upon the lands. As to the title to such lands, it had the effect of an admitted legal contract or obligation by the husband to convey, and should be enforced in equity here. A judgment in New York that a party defendant shall specifically perform a written contract to convey lands in New Jersey would furnish no

better foundation for the interference of our court of equity than the judgment relied upon in this case. In what respect they differ in principle is not apparent. In either case, obedience to the mandate of the federal constitution would give effect to the judgment here. In *Institution v. Gerber*, 85 N. J. Eq. 158, this court held that a judicial order in New York that the garnisher owes a debt to the defendant in a judgment, such moneys being in the custody of a court of equity, creates *per se* a right to apply to such court for such moneys, in the same way as an assignment of such moneys to the plaintiff in the judgment would have passed such right. Such a decree in the New York court settled the plaintiff's right to the fund, and that right was an equitable one, which was enforced in this state. The decree or judgment in New York has the effect of being, not merely *prima facie* evidence, but conclusive proof, of the rights thereby adjudicated; and a refusal to give it the force and effect in this respect which had in the state in which it was rendered denies a right secured by fundamental law. The force and effect of the decree for alimony in New York was not to create a lien upon lands in New Jersey, but to conclusively entitle the wife to have that decree enforced against the husband. It being competent for our courts to enforce such a decree made in our own courts by establishing it as a lien on lands, we cannot refuse like relief in this case on the extra territorial judgment. *Huntington v. Attrill*, 146 U. S. 657 (18 Sup. Ct. Rep. 224); *McElmoyle v. Cohen*, 18 Pet. 812. In *Cheever v. Wilson*, 9 Wall. 108-121, there was an order of the divorce court in Indiana directing the wife to pay one-third of her rents as they became due to her husband. The land was in Washington, where suit was brought to enforce payment of the rents to the husband. The court said that the decree in Indiana, so far as it related to the real property in question, could have no extra territorial effect; but, if valid, it bound those who were parties in the case, and could have been enforced in the *situs rei* by proper proceedings for that purpose. The judgment in New York must be regarded as conclusively imposing a legal personal obligation or duty upon the husband to mortgage his lands in New Jersey. The New York judgment is conclusive between the parties to it (1) as to the right to the divorce; (2) as to the right of the

wife to the alimony allowed; (3) it is equally conclusive, as against the husband, as to her right to have such alimony secured by a mortgage on his New Jersey lands, that being expressly a part of the adjudication in New York. The judgment imposed an obligation upon the husband, from which he cannot relieve himself by removing from the jurisdiction in which it was rendered; that obligation follows him into this state. The lien does not, by mere force of the extra territorial judgment, attach to lands in this state. To impress that lien upon lands here, the intervention of our court of equity is necessary, just as it is necessary to sue here upon a New York judgment before execution can issue from our courts to obtain satisfaction of it. The husband has had his day in court in New York, where all these questions have been adjudicated against him, and our courts should hold that he is thereby concluded. The question, in its true form, is whether we will give full faith and credit to the judgment of the New York court in so far as it finally adjudges the questions legally submitted to it, when it had jurisdiction both of the subject-matter of the controversy and of the parties to it. It seems to me that there can be but one answer to this question, and that the court below erred in dismissing the complainant's bill.

Sec. 669. Jurisdiction—Land in other states. When a court of chancery has acquired jurisdiction over the person of a party in a proper case, it may, by virtue of its power to coerce obedience to its decrees, enforce the performance of contracts relating to land situated in another state, *King v. Pillow*, 90 Tenn. 287 (16 S. W. Rep. 469); Story's Eq., §§ 743, 744, 899; 1 L. R. A. 79, *note*. Such court, however, has no power to divest title to real estate situated in another state. In such cases the court acts upon the person of the holder of the legal title subject to its jurisdiction, and, if such holder fail to convey, by proper deed, the legal title, in obedience to a decree commanding it to be done, no effect can be given in the foreign jurisdiction to the decree, so far as a conveyance of the legal title is concerned. It is essential that the court should acquire jurisdiction of the persons of the parties, and, if it proceed without such jurisdiction, either by the service of proper process or personal appearance, its judgments or decrees can have no binding effect. *Winn v. Strickland*, 34 Fla. 610 (16 So. Rep. 606); *Watts v. Waddle*, 6 Pet. U. S. 390; *Burnley v. Stevenson*, 24 Ohio St. 474 (15 Am. Rep. 621). As to the power of courts to render decrees affecting lands in other states, see Ballards' Annual, Vol. 1, §§ 263, 265; Vol. 2, § 335; Vol. 3, § 604. A court having jurisdiction of a railroad company which executed a mortgage upon a continuous line of railroad located partly in the state of such

court and partly in an adjoining state, may foreclose such mortgage and decree a sale of property in both states, although such corporation is a consolidated company, the parent of which was a corporation originally created under the laws of the other state. *McTighe v. Macon Const. Co.*, 94 Ga. 306 (21 S. E. Rep. 701; 47 Am. St. Rep. 153.)

Sec. 670. Decrees as obligations—Enforcement in other states. While it is true that the courts of one state cannot, by any decree, directly affect any interest in lands situated in another state, it is also true that the courts of one state may render a valid judgment, directing the parties properly before the court to do or perform certain acts in reference to the title to certain lands in another state, and such judgment, when properly pleaded, may be the basis of a cause of action or a defense in a proceeding in the state where the land is situated, and when so pleaded is conclusive. *Burnley v. Stevenson*, 24 O. St. 474 (15 Am. Rep. 621). The court say: "The constitution of the United States declares that full faith and credit shall be given in each state to the records and judicial proceedings of every other state, and provides that Congress may prescribe the mode of proving such records and proceedings, and the effect thereof. By an act of May 26, 1790, Congress declared that the 'records and judicial proceedings of the state courts,' when properly authenticated, 'shall have the same faith and credit given to them in every court within the United States, as they have, by law or usage, in the courts of the state from whence they are or shall be taken.' When, therefore, a decree rendered by a court in a sister state, having jurisdiction of the parties and of the subject-matter, is offered as evidence, or pleaded as the foundation of a right, in any action in the courts of this state, it is entitled to the same force and effect which it had in the state where it was pronounced. *Mills v. Duryea*, 7 Cranch. 481; *Hampton v. McConnell*, 3 Wheat. 234; *McGillray & Co. v. Avery*, 30 Vermont, 538. That this decree had the effect in Kentucky of determining the equities of the parties to the land in this state, we have already shown; hence the courts of this state must accord to it the same effect. True, the courts of this state can not enforce the performance of that decree, by compelling the conveyance through its process of attachment; but when pleaded in our courts as a cause of action, or as a ground of defense, it must be regarded as conclusive of all the rights and equities which were adjudicated and settled therein, unless it be impeached for fraud. See cases *supra*; also, *Davis v. Headley*, 22 N. 115; *Brown v. L. & D. R. R. Co.*, 2 Beasley Eq. (N.) 191; *Dobson v. Pearce*, 2 Kernan, 156; *U. S. Bank v. Bank of Baltimore*, 7 Gill, 415."

EPITOME OF CASES.

Sec. 671. Jurisdiction of person—Title in issue—Statutes construed. Jurisdiction of the person, unless the

parties waive service and voluntarily appear, can only be acquired by an observance of the modes of procedure prescribed by law. *Williams v. Monroe*, 125 Mo. 574 (28 S. W. Rep. 858). For cases depending upon particular facts and illustrating as to when title is in issue, see *Orris v. Kempton*, Mich. (68 N. W. Rep. 68). Where the judgment appealed from is not an adjudication of title in such manner as would authorize a new trial as of right, the jurisdiction on appeal is in the appellate court. *Corbin v. Thompson*, 141 Ind. 812 (40 N. E. Rep. 582). Rhode Island Stat., Act Aug. 22, 1898, Ch. 8, § 28, vests the district court with exclusive original jurisdiction over all actions properly brought within their districts for the possession of tenements or estates held by will or by sufferance, it is held that a judgment in such a case obtained in an action brought in the common pleas division of the supreme court of Providence county in October, 1898, was void. *Cosgrove v. Merz*, R. I. (33 Atl. Rep. 870). Penn. Stat., Act Feb. 24, 1884, touching the jurisdiction of the orphans' court to sell land charged with a legacy, construed and applied. *Luckenbach v. Luckenbach*, 170 Pa. 586 (33 Atl. Rep. 121).

Sec. 672. Jurisdiction—Law of place. As a general rule, contracts made in one place to be executed in another are to be governed by the law of the place of performance; and this rule would apply to a loan made by a building association upon land in another state. *National Mut. Bldg. & L. Ass'n v. Ashworth*, 91 Va. 706 (22 S. E. Rep. 521). A title or right in or to real estate can be acquired, enforced, or lost only according to the law of the place where such property is situated. *Acker v. Priest*, Ia. (61 N. W. Rep. 235). The law of the sovereignty in which real property is situated governs, as to the transfer of such property, whether conveyed absolutely, or by way of mortgage. *Commercial Bank v. Jackson*, S. Dak. (68 N. W. Rep. 548). Citing, Story, Conf. Laws, §§ 863–865, 424; 3 Am. & Eng. Enc. Law, pp. 563, 567, 662; Jones Mortg., §§ 661, 823; *Swank v. Hufnagle*, 111 Ind. 453 (12 N. E. Rep. 303); *Otis v. Gregory*, 111 Ind. 504 (13 N. E. Rep. 39); *Brown v. Bank*, 44 Ohio St. 269 (6 N. E. Rep. 648); *Post v. Bank*, 138 Ill. 559

(28 N. E. Rep. 978) ; *Goddard v. Sawyer*, 9 Allen, 78 ; *U. S. v. Crosby*, 7 Cranch 115 ; *U. S. v. Fox*, 94 U. S. 820. Where a deed and a declaration of trust were executed in the state of Indiana, under the laws of which the transaction was void, and subsequently a new deed of the same property was executed in the state of Illinois, where such a transaction was legal, and, as found by the referee, was made for the purpose of enabling the grantee to give a good title to the land described in said deed, and "did not change the legal relation of the parties," but no new declaration of trust was executed, it is held that the transaction in the state of Illinois had the effect to legalize the entire transaction, and that the declaration of trust is to be regarded as though re-executed in the state of Illinois, and attached to, and constituting a part of, the Illinois transaction. *Commercial Bank v. Jackson*, S. Dak. (68 N. W. Rep. 548).

Sec. 673. Jurisdiction—Land in another county. Where, under the statute requiring certain actions to be brought in the county in which the land is situated, an action is duly commenced in the county in which the land involved was situated and subsequently the portion of the county containing such land is transferred into another county, the court in which the action was commenced does not lose jurisdiction. *Security L. & T. Co. v. Kauffman*, 108 Cal. 214 (41 Pac. Rep. 467). The Cal. Const., Art. 6, § 5, provides that an action to recover land must be "commenced" in the county where the land or some portion of it is situated. Under this provision it is held that where the action is commenced in the county where the land or some portion of it is situated, it may, on change of venue, be tried in another county. *Duffy v. Duffy*, 104 Cal. 602 (38 Pac. Rep. 443). Under the statute (Ky. Civ. Code, § 62) providing that actions for the sale of real property under a mortgage lien must be brought in the county in which the subject of the action or some part thereof is situated, it is held that a foreclosure suit involving land in different counties may be brought in any one of the counties, though all of the defendants do not reside in such county. *Hendrix v. Nesbitt*, 96 Ky. 652 (29 S. W. Rep. 627). This statute applies to an action brought by devisees to sell lands and

divide the proceeds because the lands could not be partitioned. *Perkins v. McCarley*, Ky. (29 S. W. Rep. 867).

Sec. 674. Jurisdiction—State and federal courts. After a state court has acquired jurisdiction of an action to foreclose a mechanic's lien on certain property, the federal court cannot subsequently authorize a receiver appointed by it to take control of such property. *Rogers & Baldwin H. Co. v. Cleveland Bldg. Co.*, Mo. (82 S. W. Rep. 1). When a state court has acquired jurisdiction of an action affecting property it cannot be interfered with by the federal court until execution of final process. *Rogers & Baldwin H. Co. v. Cleveland Bldg. Co.*, Mo. (82 S. W. Rep. 1). Pending a controversy in the land office involving the right to public lands a state court has jurisdiction of an action to restore the possession to one who has been wrongfully evicted. *Fulmele v. Camp*, 20 Colo. 495 (39 Pac. Rep. 407). The court say: "It will be conceded that the courts are without jurisdiction to determine the right of contending parties to purchase public land while a controversy is being waged before the proper officers of the interior department to settle such right, and will refuse to aid either party, by way of affirmative relief, until such controversy is finally determined by that department. But their jurisdiction to prevent the wrongful invasion of the possession of one in the actual occupancy of the public domain, so long as the title remains in the government, is not only expressly conferred by our statute, but is essential to the maintenance of the peace and order of the community. In the exercise of this jurisdiction, the courts do not attempt to pass upon the merits of the respective claims of the contending parties, and decide which has successfully initiated and established his right to ultimately receive the legal title to the land, but only protect the actual possession, and prevent the wrongful and forcible interference therewith, until the government parts with its title."

Sec. 675. Equitable and legal jurisdiction distinguished. Where a plaintiff presents matters which are purely equitable and others purely legal and prays for relief against an action at law and fails in those matters which are equitable, his bill will not be retained by a court of chancery as to those

matters which are legal. *Collier v. Collier*, N. J. Eq.

(88 Atl. Rep. 198). Where a court of equity has acquired jurisdiction for the purpose of re-establishing a lost deed, all the parties and interests being before it, it will, upon proper prayer, retain jurisdiction for the purpose of giving effect to its decree by way of injunction. *Fries v. Griffin*, 85 Fla. 212 (17 So. Rep. 66). In Pennsylvania it is held that where a plaintiff claims under deeds, the right to build over defendant's lot, and the defendant in possession having a wall which prevented such building, denies the right, the remedy is not in equity but at law. *Saunders v. Racquet Club*, 170 Pa. St. 265 (88 Atl. Rep. 79). The mere existence of a disputed boundary, even though lost or confused, is insufficient to give a court of equity jurisdiction. In addition, there must be some equitable circumstance shown, which has arisen from the conduct, situation, or relations of the parties; such as that the boundary has become confused through the fraud of the defendant, or that the duty of preserving it rests upon him, or that it will avoid a multiplicity of suits. *Humboldt Co. v. Lander*, Nev. (88 Pac. Rep. 578; 26 L. R. A. 749). The improper or unnecessary joinder of a party plaintiff will not defeat a suit in equity. *Brown v. Lawton*, 87 Me. 88 (82 Atl. Rep. 788). The owner of a fractional part of a way may object to the partial obstruction of such way, but in order to obtain relief in equity he must show that his use of the highway is affected. *Bently v. Root*, R. I. (82 Atl. Rep. 918). In Michigan it is held that equity alone has jurisdiction to test the validity of deeds executed by an insane person not under guardianship. *Moran v. Moran*, Mich. (63 N. W. Rep. 989). Miss. Const., §§ 159 f, 160; Code 1880, § 1883, applied—equitable jurisdiction of courts. *Woods v. Riley*, 72 Miss. 78 (18 So. Rep. 884). Where the aid of the court of chancery is invoked to effect the crossing of one railroad by another, and it appears that the right to cross has been duly condemned, and that the damages in consideration have been based upon a manner of constructing the crossing proposed by the junior road, which is claimed to be unlawful, or at least unfair, this court will, incidentally to the exercise of its jurisdiction in the premises, determine the legality of the proposed manner of crossing. *National D. &*

N. Y. F. C. Ry. Co. v. Pennsylvania R. Co. N. J. Eq.

(88 Atl. Rep. 219). In Virginia it is held that, as a general rule, in the absence of statutory authority, a court of equity will not entertain a bill to remove a cloud upon the title where the owner claims to be the owner of the legal title, unless he is in possession of the land upon which the cloud rests. This is upon the ground that if he is out of possession and is the owner of the legal title, he has, ordinarily, a complete remedy at law by an action of ejectment. *Otey v. Stuart*, 91 Va. 714 (22 S. E. Rep. 518). In Virginia, under Code of 1887, § 8299, it is held that where a vendee is sued at law upon the notes given for the purchase price of the land, the court has no power to entertain a defense based upon fraudulent representations by the vendor and seeking to have the contract rescinded and reinvest the vendor with title, but that such relief can only be afforded in a court of equity. *Mangus v. McClelland*, Va. (22 S. E. Rep. 864).

Sec. 676. Proceedings after final judgment—Necessity of new notice. It is held that where a final judgment in partition has been rendered and subsequently without notice to the adverse party another judgment was rendered for costs, the latter was void for want of jurisdiction. *Roberts v. St. Louis Merchants' L. Imp. Co.*, 126 Mo. 460 (29 S. W. Rep. 584). The court say: "A party over whom a court has obtained jurisdiction must take notice of all proceedings until final judgment is rendered, but after judgment he is not regarded as being before the court, and should have notice of any subsequent proceedings which affect his rights. This is particularly so in case the original jurisdiction was obtained by publication of notice, and the judgment is by default. In such case a personal judgment could not be rendered in the first instance, nor could a judgment be rendered different from the one authorized by the proceedings of which he had notice. Freem. Judgm., §§ 142, 143; *Fithian v. Monks*, 43 Mo. 502; *Fanney v. Spedden*, 38 Mo. 395. Much less could a new and different judgment be taken, without notice, on a cause of action which accrued after the final judgment in the original action had been rendered. The right to notice in such case is fundamental, and a judgment without it would be without

due process of law. In *George v. Middough*, 62 Mo. 551, the record of a judgment, which had been destroyed, was restored without notice to the defendant therein. The court held the order restoring the judgment to be absolutely void. Wagner, J., said: 'It is a cardinal principal that, whenever a party's rights are to be affected by a summary proceeding in court, that party should be notified, in order that he may appear for his own protection.' In *Ray Co. v. Barr*, 57 Mo. 291, it is said: 'Where the law is silent as respects notice to a person whose interest is affected by a proceeding in court, notice will almost be implied; and he must be brought in, in some appropriate way, before he will be bound.' It was held in a recent case that, after the lapse of a term at which the dissolution of an injunction occurs, notice to the opposite party of a motion to assess damages is necessary. *Hoffelman v. Franke*, 96 Mo. 584 (10 S. W. Rep. 45); see also *Musick v. Railway Co.*, 114 Mo. 809 (21 S. W. Rep. 491), and cases cited. Van Fleet gives it as his opinion 'that when a final judgment is rendered, and the term is passed, the parties are completely out of court; and that any new proceeding without a notice is just as void as the original would have been.' Coll. Attack, § 699; *Mulvey v. Carpenter*, 78 Ill. 580; *Johnson v. Anderson*, 76 Va. 766; *Gaven v. Board*, 104 Ind. 201 (2 N. E. Rep. 846)."

Sec. 677. Demand and tender. A mere defect in the title of a vendor does not excuse the vendee from making tender of purchase-money and demand for deed. *Pate v. McConnell*, 106 Ala. 449 (18 So. Rep. 98). Where the payment of the purchase price and the giving of the deed are concurrent acts, the vendor, before declaring a forfeiture, must make a tender of the conveyance, but where the purchase price is to be paid in installments, a portion of which are not due at the time of the forfeiture and consequently the time for the conveyance has not arrived, no tender of the deed is required. *Reddish v. Smith*, 10 Wash. St. 178 (38 Pac. Rep. 1008; 45 Am. St. Rep. 781). It is held by a divided court that where a father deeds to his son a tract of land, in consideration of the payment of a certain sum therein named by said son to his two sisters, one year after the father's death, without interest,

such son is not bound to wait until the end of the year after his father's death before he can pay said amount, but has the privilege of paying it at any time during the year. An offer to pay one of the sisters the amount coming to her under the deed, two or three days before the end of the year, and counting the money down to her, which she declined to receive, without assigning any cause, constituted a valid tender, under the circumstances. Said sister having made no subsequent demand for the money, said son, upon paying the money due said sister into the court after giving proper notice, was entitled to a release of the vendor's lien reserved in said deed, so far as it secured her said sum. A strictly legal tender may be waived by an absolute refusal to receive the money, on the ground that no man is bound to perform a nugatory act. It is not necessary, to constitute a legal tender, that the identical money tendered was kept and brought into court. In general the effect of a tender in proper time by the debtor is to stop subsequent interest on the claim, if the money is unqualifiedly refused, which tender may be defeated by a subsequent demand and refusal. *Thompson v. Lyon*, 40 W. Va. 87 (20 S. E. Rep. 812).

Sec. 678. Parties to real actions. A husband and wife may join in an action to recover real estate where the same is not held to the sole and separate use of the wife. *Swerdferger v. Hopkins*, 67 Vt. 187 (81 Atl. Rep. 153). It is held that where the title to land depends upon the validity of a government grant pursuant to an act of congress, July 16, 1866, for the relief of freedmen, the United States should be a party. *Green v. Niver*, 43 S. C. 359 (21 S. E. Rep. 263). A trustee in whom is vested the legal title and who is chargeable with the proper care and preservation of the property is a necessary party in all proceedings affecting the estate where there is a remainderman. *Winn v. Strickland*, 34 Fla. 610 (16 So. Rep. 606). In suits respecting the trust property, brought either by or against the trustee, the *cestui que trust* or beneficiaries, as well as the trustee also, are necessary parties; and when the suit is by or against the *cestui que trust* or beneficiaries, the trustees are also necessary parties. The trustees have the legal interest, and therefore they are necessary parties;

the *cestui que trust* or beneficiaries have the equitable and ultimate interest to be affected by the decree, and therefore they are necessary parties. *Cotton v. Coit*, 88 Tex. 414 (81 S. W. Rep. 1061). Where, in an action at law for injuries to plaintiff's land, defendant defends under authority of a lease from the state, the state is not an indispensable party, so as to deprive the court of jurisdiction, on refusal of the state to become a party. *Columbia W. P. Co. v. Columbia Elec. St. Ry. L. & P. Co.*, 43 S. C. 154 (20 S. E. Rep. 1002). In an action to set aside a deed procured from plaintiff by the fraud of the defendant, it is error, over the plaintiff's objection, to make the defendant's vendee a co-defendant to the action, it not appearing that such vendee was either a necessary or proper party thereto. *Edwards v. Richards*, 95 Ga. 655 (22 S. E. Rep. 690). A bill to review a decree confirming a sale previously ordered by a court must make the purchaser at such sale a party although he was not a formal party to the original suit. *Heermans v. Montague*, Va., (20 S. E. Rep. 899). Where real estate descends to heirs, and is not needed for administration purposes, the administrator of the deceased owner is not a necessary party to a suit affecting the title thereto. *Ellesworth v. McCoy*, 95 Ga. 44 (22 S. E. Rep. 89).

Sec. 679. Parties in actions to protect water rights. Montana Comp. St., p. 997, § 1260, is as follows: "In any suit hereafter commenced for the protection of rights acquired to water under the laws of this territory, the plaintiff may make any or all persons who have diverted water from the same stream or source parties to such action, and the court may in one decree settle the relative priorities and rights of all the parties to such suit. When damages are claimed for the wrongful diversion of water in any such suit, the same may be assessed and apportioned by the jury in their verdicts, and judgment thereon may be entered for or against one or more of several plaintiffs, or for or against one or more of several defendants, and may determine the ultimate rights of the parties between themselves." Construing and applying this section the court say: "Section 1260, above quoted, we think, contemplates an equitable action, in which the court may settle in one decree the priorities and rights of all the parties

to the water or the use thereof; and, when damages are claimed in such action for the wrongful diversion of water, the same may be assessed and apportioned by the jury, and judgment therefor may be entered for or against one or more of several plaintiffs or defendants, and the ultimate rights of the parties may be determined in such action. But in order to enable the jury to assess and apportion the damages against one or more several defendants, and authorize a separate judgment therefor, there must be evidence showing what particular damage any particular party has committed." *Miles v. Du Bey*, 15 Mont. 840 (39 Pac. Rep. 813).

Sec. 680. Pleadings in real actions. A complaint asking that a deed may be set aside for fraud, and in case it is found to be valid, that the plaintiff may recover the contract price, and have a vendor's lien, does not contain inconsistent causes of action. *Humphrey v. Ringler*, Ia. (62 N. W. Rep. 685). In an action to reform a mortgage brought by the mortgagor, the mortgagee may, by way of counterclaim, have a foreclosure of the mortgage and also a foreclosure of a subsequent mortgage made upon the same real estate. *Lahiff v. Hennepin Co. Cath. Bldg. & L. Ass'n*, 61 Minn. 226 (63 N. W. Rep. 493). It is held that in a complaint relying upon the existence of an easement, an allegation that the possession of the easement was under a claim of right with the knowledge and acquiescence of the owner is equivalent to an allegation that it is adverse. Where one uses an easement whenever he sees proper without asking permission and without objection it is adverse. Such enjoyment without explanation how it began is presumed to have been in pursuance of a grant. The owner of the land has the burden of proving that the use of the easement was under some license, indulgence or special contract inconsistent with a claim of right by the other party. *Mitchell v. Bain*, 142 Ind. 604 (42 N. E. Rep. 230). An estoppel should be specially pleaded. *Golden v. Hardesty*, Ia. (61 N. W. Rep. 913).

Sec. 681. Practice—Amendments. Where a complaint by a husband and wife describes the lot as deeded to the plaintiff and the deed offered in evidence shows that it is deeded to the wife only the court in the exercise of its discre-

tion, may amend the complaint to correspond with the evidence. *Swerdferger v. Hopkins*, 67 Vt. 187 (81 Atl. Rep. 158). Where an equitable petition, filed for the purpose of obtaining specific performance of an alleged contract for the sale of land, was met by answers setting forth facts showing that plaintiffs were not entitled to the relief prayed for, but containing no prayer for affirmative or specific relief against the plaintiffs, and there was a general verdict for the defendants, upon which a judgment for costs was entered against the plaintiffs, it was not error to deny a motion subsequently filed by the defendants to so amend this judgment as to make it adjudge that the title to the land in controversy was in one of the defendants, and direct that a writ of possession do issue in his favor. *McDaniel v. Mitchell*, 95 Ga. 40 (21 S. E. Rep. 993). An amendment in a complaint which sets up a claim to land, title to which was disclaimed by the original complaint, constitutes a new cause of action which takes effect, as to the question of limitations, at the date of its making, and does not relate back to the date of the original complaint. *East Tenn. Iron & Coal Co. v. Broyles' Heirs*, 95 Tenn. 612 (32 S. W. Rep. 761); *Hawley v. Simons*, 157 Ill. 218 (41 N. E. Rep. 616). The amendment of the pleadings in an action to quiet title so as to convert it into an action of ejectment, does not work a dismissal of the original action to quiet title so as to enable the defendant to avail himself of the statute of limitations which expired after the commencement of the suit to quiet title and before the amendment. *Hillyer v. Douglass*, 56 Kan. 97 (42 Pac. Rep. 829). After a judgment by default a complaint cannot be materially amended as to the description of the land in controversy. *Haggin v. Lorenz*, 15 Mont. 309 (39 Pac. Rep. 285). A petition may be amended, even after the answer has been filed, so as to change the form of the action, provided the identity of the cause of action has been preserved; and in a proper case the court may permit a pleading to be amended so as to conform to the proof. *Schroggin v. Johnston*, 45 Neb. 714 (64 N. W. Rep. 236). Amendments which do not change the issue of ownership, but simply amplify the title relied upon by showing that realty not mentioned in the deed was intended to be conveyed, may be permitted. *Gladish v. Godchaux*, 46 La. 1571 (16 So. Rep. 451).

Sec. 682. Practice—Miscellaneous notes. In Indiana it is held that upon the trial of an appeal from an assessment of damages by appraisers in a proceeding by a natural gas company to condemn lands for the purpose of conducting gas to its patrons the burden of proof is upon the land owner and he is entitled to open and close. *Consumers' Gas Trust Co. v. Huntsinger*, 12 Ind. App. 285 (40 N. E. Rep. 84). Replevin will lie to recover the possession of a house when the possessory rights and relation of the plaintiff to the property are such that he could have maintained an action for trespass against the party made defendant in the replevin action. *Ellsworth v. McDowell*, 44 Neb. 707 (62 N. W. Rep. 1082). Before a judgment can be rendered in favor of a party having the burden of the issue upon a special finding of facts, all the facts essential to the recovery must be stated in such finding and nothing can be taken by intendment. *Mitchell v. Brawley*, 140 Ind. 216 (39 N. E. Rep. 497). Where the plaintiff founds his action both upon fraud and breach of warranty touching the quantity of land which he bought from the defendant and paid for, it is proper to require him to elect so as to confine him to a recovery either for the deceit or the breach of warranty. *Seymore v. Rice*, 94 Ga. 188 (21 S. E. Rep. 293). In a trial of a simple action of trespass the jury has no power to establish a disputed boundary. *Seale v. Shepherd*, Ky. (29 S. W. Rep. 31).

Sec. 683. Judgments—Miscellaneous notes. Where in an action concerning land the judgment includes land not embraced in the complaint, it will be presumed that such land was included in the judgment with the consent of all parties present and actually participating in the trial of the cause. *Oliphant v. Burns*, 146 N. Y. 218 (40 N. E. Rep. 980). Upon a collateral attack, every fact not negatived by the record will be presumed in aid of a judgment and it will only be held void when it affirmatively appears from the record that the court had no jurisdiction to render it. *Rogers v. Miller*, 13 Wash. St. 82 (42 Pac. Rep. 525). Where a judgment setting aside a will is procured by fraud, in a subsequent suit between the parties claiming title to the land upon a cross complaint averring the facts constituting such fraud, it may

be set aside. Such cross complaint is a direct and not a collateral attack. *Kirby v. Kirby*, 142 Ind. 419 (41 N. E. Rep. 809). Where a decree adjudicates an interest in land and reserves its adjudication as to the partition of the land until a further term, the court may, at such further term, vacate the judgment and instead of decreeing a partition may order a sale. *Bent v. Miranda*, N. M. (42 Pac. Rep. 91). A decree is not void because it refers to the complaint for a description of the property affected by it, does not contain the stipulation on which it is based, does not strictly conform to the stipulation, and was not entered against all the parties defendant in the action. *Ronnow v. Delmue*, Nev. (41 Pac. Rep. 1074). As a rule, a judgment of a court of general jurisdiction is not void unless it appears from the record itself that the court, in pronouncing it, acted without jurisdiction. A judgment rendered without bringing the defendants into court is not for this reason void, but voidable only, unless the failure to obtain jurisdiction over them appears from the record. *Brown v. Wilson*, 21 Colo. 809 (40 Pac. Rep. 688). A final judgment, although erroneous, is conclusive upon the parties thereto so long as it remains unreversed. *Manley v. Mickle*, N. J. L. (32 Atl. Rep. 210). It is held that a judgment rendered in an action against an insolvent corporation on the day service of summons was obtained, for the full amount claimed, with costs, upon an offer made by an attorney at the request of the president of said corporation, after an assignment had been made for the benefit of creditors and while an injunction was in full force restraining said corporation, its officers and agents from in any manner incumbering any of its real or personal property, was properly vacated on motion of the assignee and officers of the corporation not assenting thereto, for the purpose of allowing said corporation and assignee thereof to answer and defend upon a ground which, if established, would be amply sufficient to defeat a recovery. *Willsie v. Rapid Val. Horse-Ranch Co.*, S. Dak. (63 N. W. Rep. 546).

Sec. 684. Receivers — Appointment, powers and duties. In an action pending on due notice or on appearance of the adverse party, a receiver may be appointed either before

or after judgment when a necessity therefor is shown. The application may be made on a written motion or petition or it may be contained in the complaint or crosscomplaint or a separate petition. *Sellers v. Stoffel*, 139 Ind. 468 (89 N. E. Rep. 52). Equity will not permit the appointment of a receiver in any case where the party applying has a clear and effective legal remedy for such damages as he alleges he will sustain by the failure to appoint such receiver. *Stephens v. Kaga*, 142 Ind. 523 (41 N. E. Rep. 930). A bill for foreclosure which asks for the appointment of a receiver by alleging that the mortgagors are insolvent, and refuse to deliver possession of the property; that they are collecting the rents and applying them to their own use, instead of to the mortgage debt; that respondents agreed in their mortgage to keep the property insured for the benefit of the mortgagee, in case of loss, which they have failed and refused to do; and that the mortgagors have failed to pay any taxes assessed against the property, states sufficient facts to warrant the appointment of the receiver. *Jackson v. Hooper*, 107 Ala. 634 (18 So. Rep. 254). Under the Iowa Code, § 2903, which provides for the appointment of receivers "during the pendency of the action," it is held that a receiver may be appointed by the district court after the cause has been decided and appealed therefrom. *Mitchell v. Roland*, Ia. (63 N. W. Rep. 606). In a recent case the supreme court of Illinois say: "The law is well settled, where a receiver has been appointed by a court of competent jurisdiction, and has taken possession of property in his capacity of receiver, he has the right to hold such property, and dispose of it under the direction of the court; and any unauthorized interference therewith, by taking possession of the property, or instituting legal proceedings to obtain possession, without the sanction of the court appointing such receiver, is a direct contempt of court, and punishable as such." *St. Louis A. & S. R. Co. v. Hamilton*, 158 Ill. 366 (41 N. E. Rep. 777). Citing, *Richards v. People*, 81 Ill. 554.

Sec. 685. Receivers—Liability of for rent. A receiver of an insolvent corporation does not by merely taking possession of leased premises become liable for rent as an assignee of the term. *Tradesman Pub. Co. v. Knoxville Car*

Wheel Co., 95 Tenn. 684 (82 S. W. Rep. 1097; 49 Am. St. Rep. 943); *Bell v. American Protective League*, 163 Mass. 558 (40 N. E. Rep. 857; 47 Am. St. Rep. 481). In the last case the court say: "It is difficult to see upon what principle a receiver, in the absence of a statute vesting the title of the insolvent in him, can, in any legal sense, be said to be the assignee of a term. In *Ellis v. Railroad*, 107 Mass. 1, 28, it was said by Mr. Justice Wells, speaking of a decree of this court appointing receivers of a railroad company: 'It had no effect to change the title or create any lien upon the property. Its purpose, like that of an injunction *pendente lite*, was merely to preserve the property until the rights of all parties could be adjudged. The receivers are officers of the court for this purpose, and act under its direction and control.' A receiver is merely a ministerial officer of the court, or, as he is sometimes called, the 'hand of the court.' The title to the property does not change; and, if he is required to take property into his custody, such custody is that of the court. *Union Bank of Chicago v. Kansas City Bank*, 136 U. S. 236, 10 Sup. Ct. 1013; *Thompson v. Phoenix Ins. Co.*, 136 U. S. 287, 297, 10 Sup. Ct. 1019."

Sec. 686. Attorney's fees and costs. The right of the successful party to recover attorney fees, in the absence of an express contract to that effect, is strictly statutory. *Miller v. Kehoe*, 107 Cal. 340 (40 Pac. Rep. 485). One made a party after the commencement of a suit cannot be charged with costs which had previously accrued. *Williams v. Washington*, 48 S. C. 355 (21 S. E. Rep. 259). Under Mich. How. St., §§ 8964, 8967-8969, it is held that but one bill of costs in favor of defendants in ejectment is contemplated where the cause has gone to trial and all defendants are acquitted. *Black v. Carpenter*, 104 Mich. 286 (62 N. W. Rep. 369). Under the N. C. Code, § 525, which provides that the plaintiff upon recovery shall be allowed costs when a claim of title to real property arises on the pleadings, it was held that where the defendant in an action of trespass failed to disclaim title to the land declared for, he was liable for the costs, although he recovered the land claimed in his answer

with a greater amount of damages than was allowed the plaintiff. *Moore v. Angel*, 116 N. C. 843 (21 S. E. Rep. 699).

Sec. 687. New trial as of right. An application for new trial as of right cannot be made until after judgment is rendered. *Personette v. Cronkhite*, 140 Ind. 586 (40 N. E. Rep. 59). In a proceeding to recover damages for the appropriation of a right of way there can be no new trial as of right. *Midland Ry. Co. v. Galey*, 141 Ind. 483 (39 N. E. Rep. 940; 40 N. E. Rep. 801). Under the Minn. Gen. Stat. 1894, § 5845, it is held that a second trial cannot be had as a matter of right unless the possession of real estate is sought either by the plaintiff or the defendant. *Schons v. Vil. of Kellogg*, 61 Minn. 128 (63 N. W. Rep. 257).

Sec. 688. Appeals—Miscellaneous notes. Where a tribunal exercises a special jurisdiction conferred by statute its judgment is final and conclusive unless the statute provides for an appeal. *Jackson v. Bennett*, 80 Md. 76 (30 Atl. Rep. 612). Upon appeal the court will presume that the theory upon which the action was tried and determined in the trial court is as disclosed in the record and the parties will not be permitted to depart from such theory in the appellate court. *Pillars v. McConnell*, 141 Ind. 670 (40 N. E. Rep. 689). Under the Colo. Code, 1887, § 888, the right of appeal is limited to the parties to the record and cannot be asserted by one who is simply a defendant to a petition of intervention. *Fisher v. Hanna*, 21 Colo. 9 (39 Pac. Rep. 420). As to what is a final judgment authorizing a writ of error, see *Schmidt v. Huff*, 87 Tex. 385 (28 S. W. Rep. 1055). In an appeal from a judgment in an action to adjudge the priority of a tax lien which judgment declares the plaintiff's lien "superior to the liens of the other defendants referred to in the complaint," all the defendants, even those defaulting, should be made parties. *Midland R. Co. v. St. Clair*, Ind. (42 N. E. Rep. 214). An appeal from a judgment of partition is barred by the sale of his allotted portion by the appellant. *Ligare v. Chicago*, 157 Ill. 686 (41 N. E. Rep. 1021). An appeal from a decree of foreclosure suspends further proceedings. *Kaminsky v. Trantham*, S. C. (22 S. E. Rep. 746). Under Washington Gen. Stat., § 2170, the superior court has

jurisdiction of an appeal from the decision of the state board of equalization making an award of the right to purchase tide lands. *Hays v. Merchants' Bank*, 10 Wash. St. 573 (39 Pac. Rep. 98).

Sec. 689. As to when a freehold is involved so as to govern the granting of an appeal. Where it is sought merely to charge the defendant's land with the plaintiff's demand for money, the title to land is not involved so as to give jurisdiction on appeal. *McGregor v. Pollard*, 130 Mo. 382 (32 S. W. Rep. 640); *Lemmon v. Lincoln*, 130 Mo. 385 (32 S. W. Rep. 662). Under the Illinois statute governing appeals it is held that a bill filed by a judgment creditor to set aside a fraudulent conveyance made by his debtor and to subject the land to the payment of a judgment does not involve a freehold. *Hupp v. Hupp*, 158 Ill. 490 (39 N. E. Rep. 124); *Moshier v. Reynolds*, 155 Ill. 72 (39 N. E. Rep. 621). When the title to real property is directly put in issue by the pleadings and the judgment until reversed is conclusive of such title, a freehold is involved within the meaning of a statute giving jurisdiction upon appeal to cases which involve a franchise or freehold. *McClellen v. Hurd*, 21 Colo. 197 (40 Pac. Rep. 445). Where the issue was the right to redeem which would determine the title, it was held that a freehold was involved. *In re Grading of Kansas Ave.*, 127 Mo. 422 (30 S. W. Rep. 107). Title to real estate is involved in an action to set aside a deed of trust on the ground of fraud. *Overton v. Overton*, 131 Mo. 559 (33 S. W. Rep. 1). Where the object of an action is to determine the validity of a deed executed under a foreclosure sale and purporting to convey the fee, a freehold is involved within the meaning of the statute of Illinois regulating appeals. *Smith v. Jackson*, 153 Ill. 399 (39 N. E. Rep. 130). A proceeding in forcible detainer is not appealable as involving a freehold. *McDole v. Shepardson*, 156 Ill. 383 (40 N. E. Rep. 953).

Sec. 690. Reversal of judgment—Restitution. A judgment will not be reversed on appeal for the erroneous reasons assigned by the court below, if upon the whole record the judgment is right. *Donovan v. Simmons*, 96 Ga. 340 (22 S. E. Rep. 966). A judgment will not be reversed in order

to permit a party to plead equities, when upon the trial he chose to rely upon his legal title. *White v. Cole*, 87 Tex. 500 (29 S. W. Rep. 759). As a general rule, upon an appeal, parties will be bound by the theory upon which they proceeded in the court below. *Harwood v. Toms*, 130 Mo. 225 (32 S. W. Rep. 666). A judgment may be reversed in part and affirmed in part by the rendition of judgment in the supreme court. *Cotton v. Coit*, 88 Tex. 414 (31 S. W. Rep. 1061). Upon the reversal by an order for a writ of restitution, the evicted party is entitled to be restored to all that he has lost by virtue of such order and to be placed in the same position as he was prior to the execution of the writ. *Hyde v. Boyle*, 105 Cal. 102 (38 Pac. Rep. 643). Under Iowa Code, § 3198, which provides for the restoration of property upon the reversal of a judgment by virtue of which it is taken, it is held that where one voluntarily makes an unnecessary payment to redeem from a sale made under a judgment which is subsequently reversed he cannot recover. *Weaver v. Stacy*, Ia. (62 N. W. Rep. 22).

Sec. 691. Slander of title—Remedy. A court of equity will never lend its aid, by injunction, to restrain the libeling or slandering of title to property, where there is no breach of trust or contract involved, but in such cases the remedy, if any, is at law, and the alleged insolvency of the libelant, in such cases, will not, of itself, authorize the interference of the court of equity. *Reyes v. Middleton*, 36 Fla. 99 (17 So. Rep. 937; 51 Am. St. Rep. 17; 29 L. R. A. 66). Citing, *Boston Diatite Co. v. Florence Mfg. Co.*, 114 Mass. 69; *Wetmore v. Scovell*, 3 Edw. Ch. 543; *Brandreth v. Lance*, 8 Paige 24 (34 Am. Dec. 368); *Mauger v. Dick*, 55 How. Prac. 182; *Association v. Booger*, 3 Mo. App. 173; *Singer Mfg. Co. v. Domestic Sewing-Machine Co.*, 49 Ga. 70 (15 Am. Rep. 674); *Clark v. Freeman*, 11 Beav. 112; *Seeley v. Fisher*, 11 Sim. 581; *Prudential Assur. Co. v. Knott*, 10 Ch. App. 142.

Sec. 692. Former adjudication—What is—Who bound thereby. The record of a judgment or decree *in personam* or *quasi in rem* can affect only parties and privies; that is, those who have the right to adduce testimony or cross-ex-

amine the witnesses introduced by the other side, or who have a right to defend the action or suit, or to appeal from the judgment or decree, or those who claim by mutual succession or relationship to the same rights of property or subject-matter. All other persons are strangers, and the judgment is not binding upon them. *Lattie-Morrison v. Holladay*, 27 Ore. 175 (39 Pac. Rep. 1100). Where, in an action by the grantor in a deed alleged to have been executed as a mortgage, it has been determined that such grantor's right to redeem has been barred by limitation, he cannot subsequently assert such equity as a defense to an action of ejectment by the grantee. *Allen v. Allen*, 106 Cal. 137 (39 Pac. Rep. 436). In order to constitute a former adjudication there must be an identity of issue and parties. A party having sued in one action in one right is not barred from suing in another action in a different right. *Kitts v. Willson*, 140 Ind. 604 (39 N. E. 818); *Peterson v. Sohl*, 141 Ind. 466 (40 N. E. Rep. 910). The confirmation of a judicial sale to which all who are interested are parties is conclusive on the question of title. *Webster v. Kings Co. Trust Co.*, 145 N. Y. 275 (39 N. E. Rep. 964). Where a wife does not join in a mortgage by her husband and in a foreclosure proceeding subsequent to his death she is made a party but no issue is tendered as to her right of dower, the judgment will not bar her subsequent recovery of dower. *Nelson v. Brown*, 144 N. Y. 384 (39 N. E. Rep. 855). A judgment foreclosing a mortgage given by an executrix under a power precludes a defendant thereto from showing that the mortgage was given in violation of the power. *Roarty v. McDermott*, 146 N. Y. 296 (41 N. E. Rep. 80). The right to claim compensation for improvements is not adjudicated by a court refusing to allow the claimant to set up such claim as a defense to an action for the land. *Salinas v. C. Aultman & Co.*, S. C. (22 S. E. Rep. 889). A grantor, who is notified by a grantee to appear in an action against the grantee involving the title to the land, is bound by the judgment rendered in such action. *Fitzpatrick v. Hoffman*, 104 Mich. 228 (62 N. W. Rep. 349).

Sec. 693. Former adjudication of title—Presumptions as to pleading—Extent and conclusiveness of

decree. It is held that in an action for the possession of land to which the defense of former adjudication has been interposed, the record of which discloses the fact that an issue of title was actually tried and determined but that the answer necessary to present such issue was not in the record, it will be presumed that such answer was so framed as to properly present the issue. Where the former adjudication is in the nature of a suit to recover wharfage and the material issue was the right of a claimant to extend his wharf over certain low water lands the title to which was in dispute between the parties, the question of the title to such lands cannot be subsequently litigated between the parties in an action for possession. *Sargent & Co. v. New Haven Steamboat Co.*, 65 Conn. 116 (81 Atl. Rep. 548). When a judgment in a partition proceeding is relied upon as *res adjudicata* there is no presumption that title was involved in such proceeding. *Goss v. Wallace*, 140 Ind. 541 (89 N. E. Rep. 920). Upon a collateral attack upon a judgment of a court of competent jurisdiction, the law will make all necessary presumptions to sustain the judgment. *Belles v. Miller*, 10 Wash. St. 259 (88 Pac. Rep. 1050). The continuation of jurisdiction when once attached will be presumed. *Baldwin v. Baer*, 10 Wash. St. 414 (89 Pac. Rep. 117).

Sec. 694. Judgment on demurrer. A decree sustaining a demurrer to a complaint, and dismissing a suit, because it does not state facts sufficient to constitute a cause of suit, is, until reversed, a final determination of the issues presented by such complaint, and can be pleaded as a bar to a subsequent suit for the same cause. When an essential allegation is wanting in a complaint to which a demurrer is sustained, followed by a decree of dismissal, which allegation is fully supplied in the second suit, the decree in the first is not a bar to the second; and this is so although the respective suits were instituted to enforce the same right, for the reason that the merits of the case as disclosed in the second complaint were not heard and decided in the former suit. *O'Hara v. Parker*, 27 Ore. 156 (89 Pac. Rep. 1004).

Sec. 695. Conclusiveness of judgment as between defendants. It is held that where in an action involving the

title to land, defendants answer separately and each claims title in himself, the judgment is an adjudication of title as between such defendants and those claiming under them. *Baugert v. Blades*, 117 N. C. 221 (28 S. E. Rep. 179). The court say: "The rule seems to be that a judgment against several defendants determines none of the rights of the defendants among themselves, but only the existence and legality of the demand. Where, however, the respective rights of the parties are drawn in issue by them and adjudicated, the judgment is conclusive between them. If the party, however, entitled to the benefit of a judgment, opens the same in part, it will be open for general purposes in the second action, if it does not contain within itself orders or directions sufficient to carry it into effect, and can no longer be treated as *res adjudicata*. Parties unwilling to be made plaintiffs are frequently made defendants for the very purpose of having their rights adjudicated and to have titles quieted. If the parties have had a hearing and an opportunity to be heard and to assert their rights, they are concluded as far as it affects their rights presented and passed upon by the decree of the court."

Sec. 696. Agreed decree—Parol agreement to affect. Where several parcels of real estate were in controversy, and the parties to the action, by mutual consent, procured a decree to be made declaring and adjudicating that some of the property should belong to one of the parties and some to the other, without imposing any trust, limitation, or condition upon the title of either, the decree, until vacated, modified, or reformed for fraud or mistake, is conclusive upon both; and one of them cannot, after it has been fully executed, set up and enforce a parol agreement alleged to constitute a part of the terms of the settlement from which the decree resulted, and by which the other undertook and promised to devise to the former, by will, one of the parcels disposed of by the decree, and declared by it unconditionally and absolutely to be the property of the latter. *Hardy v. Marvin*, 94 Ga. 681 (21 S. E. Rep. 888).

Sec. 697. Former adjudication—Judgments in ejectment and to quiet title. The supreme court of Missouri say:

“ While ejectment is the appropriate form of action, in this state, to try title, yet it is, by nature, a possessory action. Title to real estate does not always draw to it the right of immediate possession. Hence, while the action of ejectment always tries the right to possession, it may not always try the title. Hence, a simple judgment in ejectment is not a bar to a subsequent like action upon the same title.” *Evans v. Kunze* 128 Mo. 670 (31 S. W. Rep. 128). A nonsuit in an action of ejectment does not conclude the plaintiff from subsequently asserting the same title in another action. Especially is this so where the first suit is brought by him in his individual right, and the second in his capacity as administrator of the estate of another. *Ryan v. Fulghum*, 96 Ga. 234 (22 S. E. Rep. 940). In Missouri it is held that a judgment in ejectment is no bar to a second suit between the same parties even though the titles and defense in both actions be the same. But if the defendant set up an equitable defense and there is a trial and a judgment adverse to him, the judgment is final and conclusive unless reversed on appeal or writ of error. Such judgment may be pleaded in bar in a subsequent suit between the same parties concerning the same title; but in order to constitute an equitable defense the answer must set out facts which bring the defense under some head of equitable cognizance. *Sampson v. Mitchell*, 125 Mo. 217 (28 S. W. Rep. 768). Where an action of ejectment is brought by an adverse claimant against a tenant to recover possession of the premises and judgment is rendered for such plaintiff against the tenant by default, and a writ of possession is executed by which the plaintiff is placed in actual possession, the possession is thereby changed, and the landlord is thereby actually turned out—in a second action of ejectment by plaintiffs, who derive title from the plaintiff in the first suit, against such landlord sued as defendant, the record of the recovery in the former suit is competent evidence in behalf of plaintiff in the latter suit as showing or tending to show that the defendant’s possession at that time was ended and changed by the execution of such writ of possession. *Clark v. Perdue*, 40 W. Va. 300 (21 S. E. Rep. 735). It is held that where advances were considered or may have been considered in an action of ejectment they

cannot be reconsidered on a bill to restrain an action based upon the recovery in such ejectment. *Mershon v. Williams*, N. J. Eq. (81 Atl. Rep. 778). The fact that a mortgagor in an action of ejectment against him brought by the purchaser under foreclosure of the mortgage, sets up that nothing was due on the mortgage, and judgment is rendered against him, does not bar him from maintaining an action for an accounting against his mortgagee. *Jordan v. Farthing*, 117 N. C. 181 (28 S. E. Rep. 244). A judgment in an action to quiet title is not necessarily an adjudication of the right to possession so as to bar another action. Neither action depends upon the other, for the person may be the owner and not entitled to possession and he may be in possession and not the owner. *Muffley v. Turner*, 141 Ind. 580 (40 N. E. Rep. 918).

Sec. 698. As to when injunctions will be granted. An injunction will not lie where there is an adequate remedy at law. *Cook Co. v. Chicago*, 158 Ill. 524 (42 N. E. Rep. 67); *Bostic v. Young*, 116 N. C. 766 (21 S. E. Rep. 552); *Gunn v. Hardy*, 107 Ala. 609 (18 So. Rep. 284). The remedy by injunction, is, to a certain extent, within the discretion of the court, and where it is made to appear that proceedings are being taken which will soon take from the complaining party the title to the property and give him full compensation therefor, the fact that by premature possession a trespass may be committed, does not, of itself, justify an injunction in the absence of the insolvency of the trespassing party. *Colby v. Spokane*, 12 Wash. St. 690 (42 Pac. Rep. 112). An injunction will not lie to settle a boundary. *Andries v. Detroit, G. H. & M. Ry. Co.*, Mich. (68 N. W. Rep. 526). An injunction will lie to prevent a city from unnecessarily changing the line of a street to the great injury of the abutting owners. *Delashmutt v. Oskaloosa*, Ia. (62 N. W. Rep. 16). An injunction will lie to prevent the obstruction of a water course. *Schnitzius v. Bailey*, N. J. L. (82 Atl. Rep. 219). An injunction will lie on the part of an abutting owner to prevent the unauthorized construction of an electric street railway. *Thomas v. Inter-Co. St.*

Ry. Co., 167 Pa. St. 120 (81 Atl. Rep. 476). A preliminary injunction will not be granted where the sole question involved is an unsettled question of law doubtful in its character. *Borden v. Atlantic, H. R. B. & L. B. Elec. Ry. Co.*, N. J. Eq. (88 Atl. Rep. 276).

Sec. 699. Injunction as a remedy for trespass. Two conditions must concur to give a court of equity jurisdiction to enjoin a mere trespass on real property: First, complainant's title must be admitted, or legally established; and, second, the trespass must be of such a nature as to cause irreparable damage, not susceptible of complete pecuniary compensation. The inadequacy of the legal remedy is the foundation and indispensable prerequisite for the interference of chancery in such cases. *Woodford v. Alexander*, 85 Fla. 333 (17 So. Rep. 658); *Garrett v. Bishop*, 27 Ore. 349 (41 Pac. Rep. 10). An injunction will not lie to prevent a trespass on land unless the trespasser is insolvent. *Comm'rs of Highways v. Green*, 156 Ill. 504 (41 N. E. Rep. 154); *Bridges v. Sargent*, 1 Kan. App. 442 (40 Pac. Rep. 823); *Lee v. Watson*, 15 Mont. 228 (38 Pac. Rep. 1077). One may obtain an injunction against trespass or waste without proving that he could not obtain compensation in damages in a suit at law. *Rakes v. Rustin L. M. & Mfg. Co.*, Va. (22 S. E. Rep. 498). In a recent case the supreme court of Illinois say: "Courts of equity will interfere to restrain trespass, whether committed under the forms of law or otherwise, in but exceptional cases. These exceptions are included in two classes: First, to prevent irreparable injury, and, second, to avoid a multiplicity of suits. Where application is made to a court of chancery under the first class, the facts and circumstances must be alleged from which it may be seen that irreparable mischief will be the result of the act complained of, and that the law can afford no adequate relief. A mere allegation of such facts is not sufficient to warrant a decree for a perpetual injunction in such case, unless admitted by the pleadings. The question of the existence of an adequate remedy at law to defeat the jurisdiction of a court of chancery may be raised by a demurrer to a bill for failing to make the necessary averment, or it may be specially set up and relied upon in the answer. Where the

jurisdiction is challenged, and an issue by the answer to a bill with sufficient averments, on hearing, the evidence must sustain the averments of the bill, or jurisdiction is lost." *Harms v. Jacobs*, 158 Ill. 505 (41 N. E. Rep. 1071). The supreme court of Kentucky say: "It is a well-settled rule of law that for a mere trespass, where the recovery in damages will fully compensate for the wrong, a court of equity will not interfere; but it is equally as well settled that where the trespasses are continued, and must result in a multiplicity of suits, a court of equity will interfere, and particularly when the wrong complained of is the assertion of a right not only hostile to the claim of the real owner, but that by its exercise will give the wrongdoer, by the user or claim, such a right as will deprive the real owner of title. *McCloskey v. Doherty*, Ky. (80 S. W. Rep. 649).

Sec. 700. Mandatory injunctions to compel the removal of structures. A mandatory injunction will lie to compel the removal of obstructions to a private way. *Boland v. St. John's Schools*, 163 Mass. 229 (39 N. E. Rep. 1035). So will it lie to compel the removal of a wall which has been built upon a partition line and which wrongfully extends a few inches over upon the land of the complaining party. *Norton v. Elwert*, Ore. (41 Pac. Rep. 926). The court say: "We can perceive no just reason, in the cases where the title is admitted or has been established at law, why a party out of possession, when he shows such equitable circumstances as to clearly entitle him to relief may not invoke the aid of a court of equity, and be restored to his estate; and though it must be admitted that equity will generally refuse to permanently enjoin a trespass where the defendant is in actual possession, but will leave the parties to their legal remedies, it is, nevertheless, a general principle that the remedy which warrants a refusal of relief by injunction must be plain and adequate. 1 Spel. Extr. Rel., § 370. Applying these rules to the case made by the record, the inquiry is elicited whether, admitting the allegations of the complaint to be true, the plaintiff will suffer irreparable injury, and, if so, has she a plain and adequate remedy at law? If, in an action of ejectment, the wall cannot be removed, the injury resulting from its

erection could not be compensated by any measure of damages, however great the sum which a jury might award, for it would, in effect, amount to a condemnation of the plaintiff's property, and an appropriation of it to the defendant's private use; and to concede that ever so small a strip of plaintiff's premises could be thus taken would be to admit a rule of law which must necessarily be almost limitless in its application. In an action at law it would be difficult for the plaintiff to regain possession of that portion of her land occupied by the wall, for the sheriff, when called upon, might well hesitate to execute a writ commanding a restoration of the premises, since he must cut the wall to the division line, and in doing so he might take more than the 'merchant's pound of flesh,' and thus render himself liable in damages to the defendant. *Baron v. Korn*, 127 N. Y. 224 (27 N. E. Rep. 804). The removal of the wall being difficult, the plaintiff has no plain remedy at law, and hence she must suffer irreparable injury, and for the recovery of the damages resulting therefrom she could have no adequate remedy at law. In all such cases, equity will, upon the theory that wherever there is a right there is also a remedy, interpose and grant complete relief, and for that purpose will, where there has been no unreasonable delay in seeking the relief, award a mandatory injunction, and place the obligation of removing the structure upon the party who caused it to be erected. *Murdock's Case*, 20 Am. Dec. 881; *Starkie v. Richmond*, 155 Mass. 188 (29 N. E. Rep. 770)."

REAL ESTATE AGENT.

EPITOME OF CASES.

Sec. 701. Authority of a real estate broker. Authority to an agent to execute a contract in the name of his principal may be proven by express authorization, or may be inferred from the course of dealing between the parties. A contract entered into by an agent in the name of his principal without previous authorization may be adopted by the princi-

pal, and such adoption may be inferred from the principal's subsequent silence and acquiescence, or by his receipt and retention of the fruits of the contract; and such subsequent adoption has the same effect as if there had been previous authority. Authority given to an agent to make sale of land includes authority to execute a binding contract for such sale in the name of the principal. A mere employment of a real estate broker to find a purchaser of land at a stated price does not include authority to execute a contract binding upon his principal. In contracts for the conveyance of land, which are silent as to the character of the title to be conveyed, the implication is that the vendor shall convey a good title, and, if an agent be authorized generally to execute a contract for the sale of land it is not in excess of his authority to insert in the contract a provision that the title shall be free and clear, and also provision for a reasonable time in which to deliver the deed and pay the purchase money. *Keim v. Lindley*, N. J. Eq.

(80 Atl. Rep. 1068). For cases which depend upon particular facts and illustrate the question of a broker's authority, see *Furst v. Tweed*, Ia. (61 N. W. Rep. 857); *Berry v. Tweed*, Ia. (61 N. W. Rep. 858). It is held that "a written option to purchase land does not necessarily supercede a prior oral contract of agency between the same parties for the sale of the same land on commission, whether the option be regarded as one independent contract or merely as a writing to be used by the agent to show his authority to make a sale; and in either case the contract of agency may be shown by parol." *Starke v. Wolf*, 90 Wis. 484 (68 N. W. Rep. 755). One member of a firm of real estate brokers may bind his co-partners by a revocation of a contract previously entered into by him with the owners of lands whereby for a time agreed upon such firm had acquired an exclusive right to sell such lands. *Kramer v. Toledo & O. Cent. R. Co.*, 58 O. St. 486 (42 N. E. Rep. 252).

Sec. 702. Employment—Unsolicited services of—
Implication of promise. It is held that the mere consent of one who has real estate for sale that a real estate agent may render unsolicited services, does not constitute such an employment of the broker as will entitle him to remuneration. *Viley*

v. *Pettit*, 96 Ky. 576 (29 S. W. Rep. 488). The court say: "It is a general rule founded upon common sense and common justice, that the law will imply both a request and promise by one who, knowing all the facts, stands by, consenting, when it is his duty to object, to services rendered for his benefit and advantage by another. But in order to create liability, in absence of an express request and promise to pay, relation of the parties and circumstances under which the services are rendered must be such as to show, not only the services were for benefit of the person receiving them, but that he knew, or had reasonable grounds to believe, the person rendering them expected to be paid therefor. And no better illustration of the danger and injustice of implying a request and promise to pay for services rendered, simply because no objection is made, could be offered than is done by this case; for the very business appellant is engaged in, that of buyer as well as seller on commission of real estate, may exact of him allegiance and devotion to the exclusive interest of the vendor or purchaser, as he may be employed by one or the other, and there is nothing in appellant's petition repelling the idea he may not in this instance have been in the service of both buyer and seller of the land. It seems to us, mere consent by one that another may render unsolicited services in relation to his business affairs is not enough to raise an implication of request and promise to pay. There must be a distinct allegation of benefit, and such condition and relation of the parties as to show an understanding or expectation by them that the services would be paid for." As to what constitutes an employment of a real estate agent to sell land as illustrated by a case depending upon particular facts, see *Dunn v. Price*, 87 Tex. 818 (28 S. W. Rep. 681).

Sec. 703. Principal and agent—Ratification of acts. The unauthorized act of an agent, when ratified by his principal, is as binding as though the act had been within the scope of the agent's authority, and the principal, by accepting the benefits of an unauthorized act of his agent, may thereby ratify the act; but in order for the act of the principal, in accepting the fruits of a transaction conducted by his agent, to work a ratification of the agent's act, the principal must have

accepted the avails of the transaction with knowledge of all the material facts. The existence of the knowledge of the unauthorized act and the intention to ratify it must concur in the mind of the principal, in order to estop him. *Holm v. Bennett*, 43 Neb. 808 (62 N. W. Rep. 194). Ratification means the adoption by a person, as binding upon himself, of an act done in such relations that he may claim it as done for his benefit, although done under such circumstances as would not bind him, except for his subsequent assent, as where an act was done by a stranger having at the time no authority to act as his agent, or by an agent not having adequate authority. The acceptance of the results of the act with an intent to ratify, and with full knowledge of all the material circumstances, is a ratification. Ratification makes the contract, in all respects, what it would have been if the requisite power had existed when it was entered into. It relates back to the execution of the contract and renders it obligatory from the outset. The party ratifying becomes a party to the contract, and is, on the one hand, entitled to all its benefits, and, on the other, is bound by its terms. *Town of Ansonia v. Cooper*, 64 Conn. 586 (30 Atl. Rep. 760). Citing, *Negley v. Lindsay*, 67 Pa. St. 217 (5 Am. Rep. 427); *Edwards v. Railroad Co.*, 1 Mylne & C. 650-672; And. Law Dict. *in verb.*; *Stanton v. Railroad Co.*, 59 Conn. 272 (22 Atl. Rep. 300; 21 Am. St. Rep. 110).

Sec. 704. Purchase of property by agent—Agent's relations must be consistent. It is held that while an agent may purchase property which he is employed to sell, it appearing that there is no fraud or concealment, he will not be permitted to recover a commission for making such sale unless it be shown that by the terms of his employment or by some subsequent agreement with his principal he was to have a commission upon a sale to himself, and this rule applies where the sale is made to a firm of which the agent is a member and also to a sale made by a firm of brokers to a syndicate to which one of the members belonged. *Hammond v. Bookwalter*, 12 Ind. App. 177 (39 N. E. Rep. 872). The court say: "The policy of the law is to exact from an agent the strictest integrity with reference to the duty owing from him to his employ-

when an agent's commission is earned, see *Harvey v. Hamilton*, 155 Ill. 377 (40 N. E. Rep. 592); *Kelly v. Stone*, Ia. (62 N. W. Rep. 842); *Rucker v. Hall*, 105 Cal. 425 (38 Pac. Rep. 962).

Sec. 706. Withdrawal or change of terms by vendor. It was held that a real estate broker was not entitled to commission on account of the acceptance of an offer which had been withdrawn before notified of its acceptance; but as there was no agreement that the broker's services were to be rendered on a mere contingency he was entitled to a commission for his labor, time and expenses made in good faith before notice of the change in the terms of his agency. *Vincent v. Woodland Oil Co.*, Pa. St. (80 Atl. Rep. 991). It is held that where the broker was authorized to sell at a given price and was afterwards authorized to sell for less which latter authority was withdrawn before any negotiations and before the broker had done anything to find a purchaser, he could not recover commission for subsequently procuring a purchaser able, ready and willing to purchase at the reduced price. *Wilson v. Dyer*, 12 Ind. App. 820 (89 N. E. Rep. 168).

Sec. 707. Illegal sales—Recovery of commission. A broker can recover no commission for a sale made in violation of an ordinance requiring brokers to procure license before engaging in their business. *Richardson v. Brix*, Ia. (63 N. W. Rep. 825). A corporation cannot avoid the payment of an agreed commission for the sale of real estate on the ground that the law prohibits it from dealing in real estate where it has availed itself of the benefits of the sale. *Church v. Johnson*, Ia. (61 N. W. Rep. 916). The existence of an ordinance in a city where the transaction occurs, declaring it unlawful to exercise within the city the business of a real estate broker without a license, does not prevent one who is not engaged in the real estate business from recovering compensation for negotiating a sale of land for another while generally engaged in other business. The law will not lend its aid to the employer to defraud the employe out of his just reward. *O'Neill v. Sinclair*, 153 Ill. 525 (39 N. E. Rep. 124).

Sec. 708. Double commission. A real estate agent who has acted for both parties to an exchange of property can recover compensation only when his services have been limited to bringing together such parties as without his interference, have agreed upon an exchange of the property with reference to which such agent procured them to meet, and even this limited right to compensation does not exist as against a party who in advance did not know of the assent to the agent's dual employment. *Strawbridge v. Swan*, 48 Neb. 781 (62 N. W. Rep. 199). Where an agent or attorney assumes to act for both parties in a contract for the sale of land, he must disclose to each the position which he occupies with reference to the other. *Palmer v. Gould*, 144 N. Y. 671 (89 N. E. Rep. 878). A broker cannot represent both parties unless they have knowledge of his double capacity, and consent to be so represented. *Blood v. La Serena L. & W. Co.*, Cal. (41 Pac. Rep. 1017).

Sec. 709. Sale by the owner. Where negotiations between the owner and a prospective purchaser have been completely broken off and the property has been placed in the hands of a broker, who brings the attention of such purchaser to the property anew, and negotiations are resumed which terminate in a purchase at a less price than the broker is authorized to accept without notice to him, it is held that he is entitled to his commission on the selling price. *Schlegel v. Allerton*, 65 Conn. 260 (82 Atl. Rep. 868). The court say: "Abundant authorities fully sustain this view, a few only of which may be cited. In *Plant v. Thompson*, 42 Kan. 664 (22 Pac. Rep. 726), it is held that an agent employed to sell real estate, who first brings it to the notice of the person who ultimately becomes its purchaser, is entitled to his commission on the sale. Nor can the owner evade his liability to pay the agent his commissions by selling for a sum less than the price given the agent, when the reduction is made of the owner's own accord. In *Tyler v. Parr*, 52 Mo. 249, it was said: 'The law is well established that, in a suit by a real estate agent for the amount of his commission, it is immaterial that the owner sold the property and concluded the bargain. If, after the property is placed in the agent's hands, the sale is

brought about or procured by his advertisement and exertions, he will be entitled to his commissions.' In *Arrington v. Cary*, 5 Baxt. 609, it is said: 'When a broker is employed to sell real estate, and produces a person who ultimately becomes a purchaser, he is entitled to his commission, although the trade may be effected by the owner of the property.' See, also, *Carter v. Webster*, 79 Ill. 435; *Sussdorff v. Schmidt*, 55 N. Y. 819; *Hedden v. Sheperd*, 29 N. J. L. 334. The case of *Lincoln v. McClatchie*, 36 Conn. 136, is entirely in point. The defendant put into the hands of the plaintiff, a real estate broker, a house to sell for \$6,500, the plaintiff to receive a commission of 1 per cent. if he sold the house, the defendant to have the right to sell himself, without being liable to a commission, and the plaintiff not to advertise. The plaintiff did advertise houses for sale on the street where the house in question was situated. A person living on that street, and who was desirous of finding a house near by, for a friend, saw the advertisement, went to the plaintiff's office, and learned that the defendant's house was for sale. He informed his friend, who went to the defendant and negotiated with him for it, and finally purchased it. He never had any personal intercourse or dealings with the plaintiff and his friend's connection with the plaintiff was merely voluntary. It was held that the plaintiff was entitled to his commission." This doctrine is supported by *Holland v. Howard*, 105 Ala. 588 (17 So. Rep. 85).

RECORDS AND RECORDING.

EPITOME OF CASES.

Sec. 710. As to what instruments may be recorded. A lease for five years from a certain date, with the right to have a renewal for five years more, is a "lease for more than seven years from the making thereof," within the meaning of Mass. Pub. Stat., Ch. 120, § 4, requiring such a lease to be recorded in order to be valid against subsequent purchasers. *Toupin v. Peabody*, 162 Mass. 473 (39 N. E. Rep. 280).

Wash. Gen. Stat., § 1422, providing that "all conveyances of real estate, or of any interest therein, and all contracts creating or evidencing any encumbrance upon real estate, shall be by deed," and § 1439 which requires deeds and mortgages to be recorded, and makes the record constructive notice, are held not to include assignments of mortgages. *Howard v. Shaw*, 10 Wash. St. 151 (38 Pac. Rep. 746). A mortgage and the assignment thereof are "conveyances," within the meaning of the term as used in sections 8293, 8294, S. Dak. Comp. Laws, which provide that "every conveyance of real property * * * is void as against any subsequent purchaser or incumbrancer * * * of the same property or any part thereof, in good faith and for a valuable consideration, whose conveyance is first duly recorded," and "the term 'conveyance' as used in the last section, embraces every instrument in writing by which any estate or interest in real property is created, aliened, mortgaged or incumbered, or by which the title to any real property may be affected, except wills," etc. *Merrill v. Luce*, S. Dak. (61 N. W. Rep. 43). The court say: "A mortgage, although in this jurisdiction it does not convey the title to the thing mortgaged, is within the meaning of the recording acts, a conveyance. See, under this same section, *Hassey v. Wilke*, 55 Cal. 528. So, too, an assignment of a real estate mortgage is a 'conveyance' within the meaning of the term as used in the recording act. This has been repeatedly held in New York, under a law of which our § 8294 is an exact reprint. In *Decker v. Boice*, 83 N. Y. 220, the court said: 'It is doubtless somewhat incongruous, in view of the doctrine, now well settled in this state, that a mortgage is a mere security, and not a title, to define it as a conveyance of an estate or interest in the land mortgaged; but the character of mortgages as mere choses in action was not as well understood when the Revised Statutes were enacted as it has since been. By the common law a mortgage was a conditional conveyance of the land mortgaged and is still a conveyance within the recording act. An assignment of a mortgage in writing is also a conveyance within the act, for the reason that it is an instrument by which the mortgagee's interests or title is transferred.' See to same effect, *Vanderkemp v. Shelton*, 11 Paige 28; *Bacon v. Van Schoonhoven*, 87

ground that equity will not do that which will be of no benefit to the party asking it and an injury to others. *Beattie v. Whipple*, 154 Ill. 278 (40 N. E. Rep. 840).

Sec. 714. Record as notice—Indexes. The record of a deed from one not connected with the chain of title does not charge constructive notice. *Sayward v. Thompson*, 11 Wash. St. 706 (40 Pac. Rep. 879); *Ely v. Pingry*, Kan. (42 Pac. Rep. 880). A record which is erroneous on account of mistakes is constructive notice only of its contents, and not of facts which it would contain were it correct. Cal. Civ. Code, §§ 1213, 1214, applied. *Davis v. Ward*, 109 Cal. 186 (41 Pac. Rep. 1010). The record of a conveyance by one having no title is not constructive notice to a subsequent purchaser after title is acquired. *Oliphant v. Burns*, 146 N. Y. 218 (40 N. E. Rep. 980). Where a deed shows on its face that it was made under a decree persons are bound to take notice of the facts disclosed by the record of the proceedings in the cause in which the decree was entered. *Gulf Coast Canning Co. v. Foster*, Miss. (17 So. Rep. 683). The record of a mortgage is not constructive notice of a stipulation contained in a bond secured thereby to pay attorney fees in case of suit, where such stipulation was not mentioned in the record, although the bond was "referred to" in, and "made a part" of, the mortgage. *Interstate Bldg. & L. Ass'n v. McCartha*, 43 S. C. 72 (20 S. E. Rep. 807). The record of a purchase money mortgage is not affected by the fact that the deed to the mortgagor is not recorded. S. C. Rev. St., § 1968, applied. *Van Diviere v. Mitchell*, S. C. (22 S. E. Rep. 759). Where land is in the possession of a vendee under an unrecorded contract of purchase and is levied on under an execution against the vendor who had previously assigned his interest in the contract in fraud of his creditors, it was held that the recording of the levy was not constructive notice to the vendee of the claims of the execution plaintiff so as to render subsequent payments by the vendee to the assignee of the contract invalid as against such execution plaintiff. *Corey v. Smalley*, Mich. (64 N. W. Rep. 13). Where a deed containing minor defects affecting its execution has been duly recorded it constitutes notice to subsequent pur-

chasers of the rights of the parties claiming thereunder. *Carson v. Thompson*, 10 Wash. St. 295 (38 Pac. Rep. 1116). The record of a deed containing an agreement of the grantee to pay as consideration therefor a specified annuity to the grantor is notice of the lien which may be enforced therefor. *Doescher v. Doescher*, Minn. (63 N. W. Rep. 736). In the absence of controlling equities, a second mortgagee, where a prior mortgage remains unsatisfied of record, must take notice of the fact whether or not the cause of action thereon, which appears on its face to be barred by the statute of limitations, has been revived by some admission or promise of the debtor. *First Nat. Bank v. Woodman*, Ia. (62 N. W. Rep. 28); *Cook v. Prindle*, Ia. (63 N. W. Rep. 187). A record of a real estate mortgage is not a notice of a mortgage of chattels contained therein. *Ramsdell v. Citizen's Elec. L. & P. Co.*, Mich. (61 N. W. Rep. 275). The effect of the record of an instrument as notice is not affected by the failure of the officer to index the record, in the absence of any statute making the indexing a part of the recording. *Armstrong v. Austin*, S. C. (22 S. E. Rep. 768; 29 L. R. A. 772).

Sec. 715. Record as notice—Two deeds of same land by the same grantor—Rights of purchaser under junior deed prior in record—Mississippi statute construed. Although Miss. Code, 1892, § 2457, provides that conveyances of real estate “shall be void as to all creditors and subsequent purchasers for valuable consideration without notice, unless they shall be acknowledged or proved, and lodged with the clerk of the chancery court of the county, to be recorded, in the same manner that other conveyances are required by this act to be acknowledged or proved and recorded; but the same as between the parties and their heirs, and as to all subsequent purchasers with notice, or without valuable consideration, shall nevertheless be valid and binding;” and § 2458, which provides that “every conveyance, covenant, agreement, bond, mortgage, and deed of trust shall take effect as to all subsequent purchasers for a valuable consideration, without notice, and as to all creditors, only from the time when delivered to the clerk to be recorded,” it is held where an owner of land

conveys the same land to two persons at different times, one who, without knowledge of the facts, purchases from the junior grantee whose deed is first recorded, after the record of both conveyances is not protected by the statute as against the first grantee. *Woods v. Garnett*, 72 Miss. 78 (16 So. Rep. 890). The court say: "In Massachusetts and Vermont it is held that a purchaser is not bound to examine the record after the date of a recorded conveyance, to discover whether the grantor therein has made another conveyance prior in time, but junior in record, but may safely purchase from the grantee in the first recorded conveyance, if he, the purchaser, has not actual notice of the prior deed, and no notice of the facts which make it his duty to prosecute inquiry. *Connecticut v. Bradish*, 14 Mass. 296; *Trull v. Bigelow*, 16 Mass. 406 (8 Am. Dec. 144); *Morse v. Curtis*, 140 Mass. 112 (2 N. E. Rep. 929; 54 Am. Rep. 456); *Day v. Clark*, 25 Vt. 897. And this is said to be the more reasonable rule by the annotators of the *Leading Cases in Equity*, *LeNeve v. LeNeve*, 2 White & T. Lead. Cas. Eq. 180, and by Mr. Jones (1 Jones Mortg., § 574). The decided weight of authority is, however, to the contrary, though Mr. Jones cites none of them as supporting the contrary rule except the New York decisions. Among others, the following cases may be noted: *Van Rensselaer v. Clark*, 17 Wend. 25 (31 Am. Dec. 280); *Westbrook v. Gleason*, 79 N. Y. 23; *Clark v. Mackin*, 80 Hun. 411; *Mahoney v. Middleton*, 41 Cal. 41; *English v. Waples*, 18 Iowa 57; *Fallass v. Pierce*, 30 Wis. 448; *Erwin v. Lewis*, 82 Wis. 276; *Van Aken v. Gleason*, 84 Mich. 477; *Bayless v. Young*, 51 Ill. 127. The question has never been decided in this state, though in *Harrington v. Allen*, 48 Miss. 492, there is a doctrine in which Judge Simrall, mistaking the facts of his case, seems to favor the Massachusetts rule. The decisions in Massachusetts and Vermont, while resulting in practically the same end, proceed on irreconcilable and opposite principles. In Massachusetts it is ruled that the purchaser from the grantee in the deed junior in date, but senior in record, need not examine the records after the date of registration of the conveyance to his grantor. *Morse v. Curtis*, 140 Mass. 112 (2 N. E. Rep. 929; 54 Am. Rep. 456). In Vermont it is held that he is bound by the constructive notice afforded by the registration of the

first deed, that it is notice to him of the fact that a deed prior to that of his grantor had been made, but it is not notice that his grantor had notice of the first deed; and so the conveyance to the first purchaser from the second grantee is preferred in Vermont, not because the purchaser is himself a purchaser without notice, for the registration of the prior deed is notice of its existence, nor because his grantor was a purchaser without notice, for that may or may not be true, but because the purchaser did not know that his grantor was not a *bona fide* purchaser; and thus, under the Vermont decision, one may secure protection, as though he were a *bona fide* purchaser, when neither he, nor any one under and through whom he derives title, was in fact such a purchaser. This rule has no recognition except in Vermont, so far as we have discovered. We think the Massachusetts decisions are erroneous, because they hold that one not bound by the registry law is protected by it. But for the registry law, where one has conveyed his title, he has nothing left to convey to another, and that other, with or without notice of the prior conveyance, would get nothing, for his grantor had nothing to convey. Now, the statute comes, and provides that, though a conveyance of the class named in the statute may be made, it shall, as to certain persons, viz.: creditors and purchasers without notice, be valid only from a certain time, viz., the time when it is filed for record. In other words, the operation of the unrecorded conveyance is suspended until it shall be recorded as against creditors and purchasers without notice, and where recorded it does not operate by relation as against such persons from the day of its execution, but is effectual only from and of the date of its delivery for record. But where filed for record it has full scope and effect against the world. One who buys after that event can find no protection in the statute, for its terms have been complied with by the holder of the adverse title. It is no answer to say that it is inconvenient to the purchaser to examine a long and voluminous record, made after the record of the title of his grantor. To this the sufficient reply is that, but for the registry acts, he would not have even the protection which such records afford, but would deal at his peril with his grantor, and secure only such title as he might assert. If that grantor had good title because a purchaser for value, without

notice, that is a defense to his vendee; but if such grantor was not such purchaser, then the validity of the title he conveys must depend upon the character of his vendee; and, if such vendee is not a *bona fide* purchaser under the common law or the statute, we cannot perceive from what source a principle can be deduced which will afford him protection. It seems clear to us that one who buys an estate cannot invoke the protection of the registry act as against a deed recorded under such act at the time of his purchase."

Sec. 716. Miscellaneous notes. As between the parties, the validity of a deed is not affected by mistakes of the recording officer in transcribing it. *Thomas v. Stuart's Ex'r*, 91 Va. 694 (22 S. E. Rep. 511). Under a statute (N. C. Code, § 1883) which makes public officers liable to persons injured for all acts "done" by virtue of their office, it is held that a recording officer is liable for failure to index an instrument as required by statute, although the statute making it the duty of such officer to make such index was enacted after the time of his giving bond. The statute of limitation begins to run against such action, at least, from the date of the expiration of the officer's term. *State v. Grizzard*, 117 N. C. 105 (23 S. E. Rep. 93). Minn. Special Laws 1858, Ch. 64, applied—recording of deed in Toombs County. *Thomas v. Hanson*, Minn. (61 N. W. Rep. 135).

TIME FOR RECORDING.

[In Vol. II, §§ 563-611, and Vol. III, §§ 638-648, will be found a compilation of the statutory provisions of the several states and territories in reference to the time for the recording of deeds, etc. Below we note such amendments, changes and additional constructions as have been made.]

Sec. 717. Arkansas. (See Vol. II, § 565.) The statute does not apply to equitable rights and does not prevent the reformation of a mortgage as against one acquiring rights with notice of the defect. *Ft. Smith Milling Co. v. Mikles*, 61 Ark. 123 (32 S. W. Rep. 493). Citing, *Strange v. Beach*, 11 O. St. 283 (78 Am. Dec. 308).

Sec. 718. Massachusetts. (See Vol. II, § 582; Vol. III, § 641.) Under Mass. Stat. 1888, Ch. 393, a mortgage of real estate is ineffective as against an assignee in insolvency of the estate of the mortgagor unless it is recorded within four months after its date. *Harriman v. Woburn*

Elec. Light Co., 163 Mass. 85 (39 N. E. Rep. 1004). A lease for five years from a certain date, with a right to have a renewal for five years more, is within the statute. *Toupin v. Peabody*, 162 Mass. 473 (39 N. E. Rep. 280).

Sec. 719. Mississippi. (See Vol. II, § 585.) See case of *Woods v. Garnett*, 72 Miss. 78 (16 So. Rep. 390), fully epitomized in a preceding section on Record as notice—two deeds of same land by the same grantor.

Sec. 720. Montana. (See Vol. II, § 587.) An appropriator of the use of water subsequent to a conveyance of the use of the same water by an owner thereof is not a purchaser within the meaning of Comp. Stat., § 260, set out in Volume 2. *Middle Creek Ditch Co. v. Henry*, 15 Mont. 558 (39 Pac. Rep. 1054).

Sec. 721. New York. (See Vol. II, § 593; Vol. III, § 643.) "A conveyance of real property within the state, on being duly acknowledged by the person executing the same, or proved as required by this chapter, and such acknowledgment or proof duly certified when required by this chapter, may be recorded in the office of the clerk of the county where such real property is situated. Every such conveyance not so recorded is void as against any subsequent purchaser in good faith and for a valuable consideration, from the same vendor, his heirs or devisees, of the same real property or any portion thereof, whose conveyance is first duly recorded." Laws 1896, Ch. 547, § 241.

Sec. 722. North Carolina. (See Vol. II, § 594; Vol. III, § 644.) The statute applies to and protects a sheriff's deed. *Hooker v. Nichols*, 116 N. C. 157 (21 S. E. Rep. 207). The statute applies to execution sales. Under its special provisions one who purchases with notice of an unrecorded deed executed prior to December 1, 1885, does not acquire title; the statute does not apply to deeds executed before its passage until January 1, 1886, and although Code § 1245 is repealed by the statute, it continues in force for the purpose of recording such deeds until that date. Clark and Montgomery, JJ., dissenting. *Cowen v. Withrow*, 116 N. C. 771 (21 S. E. Rep. 676). Under the statute deeds of trust and mortgages are of no validity whatever as against purchasers for value and against creditors, unless they are registered, and they take effect only from and after registration. *Bostic v. Young*, 116 N. C. 766 (21 S. E. Rep. 552).

REDEMPTION.

EPITOME OF CASES.

Sec. 723. Change in redemption statute—Impairing obligation of contracts. Kan. Sess. Laws 1893, Ch. 109, concerning the sale and redemption of real estate, whether applied to existing or future contracts, is not in conflict with the provision of the federal constitution (Art. 1, § 10) that “no state shall * * * pass any * * * law impairing the obligation of contracts.” Johnston, J., dissenting. *Beverly v. Barnitz*, 55 Kan. 466 (42 Pac. Rep. 725; 49 Am. St. Rep. 257; 81 L. R. A. 74), overruling a former opinion in the same case, 55 Kan. 451 (40 Pac. Rep. 825), in which the case of *Watkins v. Glenn*, 55 Kan. 417 (40 Pac. Rep. 816), was expressly followed. These decisions contain elaborate and exhaustive discussions of both sides of the question, as to whether a statute changing the law of redemption is unconstitutional in so far as it affects prior contracts.

Sec. 724. Right to redeem. The holder of a judgment the lien of which has expired has no right to redeem. *Long v. Mellet*, Ia. (63 N. W. Rep. 190). A mortgagor's right to redeem is barred by a decree of foreclosure and sale thereunder, in the absence of some statute to the contrary. *Martin v. Ward*, 60 Ark. 510 (30 S. W. Rep. 1041). The right of redemption from sales in proceedings under special statutes will not be denied solely on the ground that the statute authorizing the sale does not provide for redemption. General redemption statutes should be liberally construed. *In re Grading of Kansas Ave.*, 127 Mo. 422 (30 S. W. Rep. 107). A person can only redeem when he has an interest to protect and where, without such redemption, he would be a loser. A prior or senior lienholder has no right to redeem from a sale by a junior lienholder. *Dawson v. Over-*

myer, 141 Ind. 488 (40 N. E. Rep. 1065). A redemption may be made by one not having the right to redeem provided the purchaser accepts the redemption money. *Smith v. Jackson*, 158 Ill. 899 (89 N. E. Rep. 130). See opinion for particular facts held insufficient to show an acceptance in such a case. Cal. Code Civ. Proc., § 701, construed and applied—redemption by “successor in interest.” *Southern Cal. Lumber Co. v. McDowell*, 105 Cal. 99 (88 Pac. Rep. 627). Where the holder of a second and third mortgage, the latter of which was junior to a grant of a right of way over the mortgaged premises, forecloses both of his mortgages at the same time, takes an assignment of the decree foreclosing the first mortgage and goes into possession, it is held that the rents and profits received by him should be applied to the reduction of the incumbrances from which the grantee of the right of way has the right to redeem. *Clark v. Paquette*, 67 Vt. 681 (82 Atl. Rep. 812).

Sec. 725. Extension of time for redemption. The time given for redemption may be extended by parol. *Brown v. Lawton*, 87 Me. 83 (82 Atl. Rep. 733); but where, after the sale of a lot to the plaintiff upon the foreclosure of its mortgage thereon, the defendant mortgagor, for the sole purpose of extending his time for the redemption of the premises five hundred days, procured his equity therein to be transferred to a third party, and received from such party one hundred separate and independent mortgages, which were recorded at different hours in the office of the register of deeds of the proper county, and filed therein one hundred independent notices of his intention to redeem the lot from such sale, it was held, distinguishing *Lumber Co. v. Tucker*, 48 Minn. 223 (50 N. W. Rep. 1038), that the mortgages and notices were void as to the plaintiff and a cloud upon his title which could be removed by an action brought for that purpose. *New Eng. Mut. Life Ins. Co. v. Capehart*, Minn. (65 N. W. Rep. 258).

Sec. 726. Procedure. A sufficient tender within the time given for redemption will support a bill brought after the expiration of such time. *Brown v. Lawton*, 87 Me. 83 (82 Atl. Rep. 733). Where the amount necessary to make redemp-

tion has been fixed the bill should allege a tender of that amount, and if it has not been fixed, there must be an offer to pay whatever sum shall be found. *Dawson v. Overmyer*, 141 Ind. 488 (40 N. E. Rep. 1065). In an action to redeem from a mortgage by a wife whose husband has abjured the realm he should be made a party. *Sanborn v. Sanborn*, 104 Mich. 180 (62 N. W. Rep. 871).

REFORMATION.

EPITOME OF CASES.

Sec. 727. As to when equity will reform instruments. Equity will correct mistakes in deeds when clearly and satisfactorily proven and the rights of innocent purchasers have not intervened to make it inequitable to do so. *Way v. Roth*, 159 Ill. 162 (42 N. E. Rep. 821); *Gladish v. Godchaux*, 46 La. 1571 (16 So. Rep. 451); *Fuller v. Hawkins*, 60 Ark. 804 (30 S. W. Rep. 84). In the case of an executed contract, equity has full power on the ground of mistake alone to correct a mistake in the description of land, even though the statute of frauds requires such conveyance to be in writing. *Judson v. Miller*, Mich. (63 N. W. Rep. 965). It is a settled rule that mistakes in a will cannot be corrected by a court of equity unless the mistake is apparent on the face of the will when applied to the subject matter of the devise; but it is held that where a devise is "of all the land of which I may die possessed" and is followed by a description of land as being in "Section 85," the testator having no land in Section 85, but owning land in Section 86, such devise will pass the title to the land so owned in Section 86. *Priest v. Lackey*, 140 Ind. 899 (39 N. E. Rep. 54). When a grantor and a grantee have made an agreement as to a conveyance of land, and a mistake of law of the scrivener, in the way of improper use of technical terms, converts the deed so that it conveys a different estate from that which it was intended, these facts being made clearly to appear, such mistake may be reformed.

McIver, C. J., dissenting. *Brock v. O'Dell*, 44 S. C. 22 (21 S. E. Rep. 976). A recorded mortgage may be reformed so as to include land omitted by mistake, as against a purchaser, with notice of the mistake, at an execution sale of the omitted property made after the recording of the mortgage or before the reformation, although the statute (Sand. & H. Ark. Dig., § 5090) provides that a mortgage is ineffectual as a lien until recorded, even as against one having actual knowledge of its existence. *Ft. Smith Milling Co. v. Mikles*, 61 Ark. 123 (32 S. W. Rep. 493). The court say: "That courts of equity can correct mistakes in contracts of all descriptions by reforming them so as to carry out the intention of the parties is beyond question. In the absence of a statute, they will interfere to correct mistakes between the original parties, even against a judgment lien or purchasers at sheriffs' sales under executions with notice of the facts, notwithstanding the judgment under which the lien was acquired or upon which the executions were issued was rendered subsequent to the execution of the contracts, but prior to the reformation. In such cases the equities are dehors the contracts, and the judgment liens attach subject to them; and parties purchasing with notice cannot defeat them. *Simmons v. North*, 3 Smedes & M. 67; *Gouverneur v. Titus*, 6 Paige 347; *Ells v. Tousley*, 1 Paige 280; *Blackburn v. Randolph*, 33 Ark. 119; 1 Story, Eq. Jur., §§ 164-167." Equity will not reform a senior patent against a junior patentee who has held adverse possession for twenty years. *Webb v. Shackelford*, Ky. (30 S. W. Rep. 395). For cases which depend upon particular facts and illustrate the right of reformation, see *Kraushaar v. Hawk*, 27 Ore. 92 (39 Pac. Rep. 539); *Burnell v. Morris*, 106 Ala. 349 (18 So. Rep. 82).

Sec. 728. As to when the mistake must be mutual. The mistake must be mutual. It is not enough to show that one party intended something different or that title did not exist as contemplated by the parties. *Cranston Print Works v. Dyer*, R. I. (32 Atl. Rep. 922). A written contract cannot be reformed unless the alleged error occurred by mutual mistake, or by the mistake of one party and the fraud of the other. It does not follow as a mere question of law,

that because a written contract is not according to the intention of one party, therefore it is not according to the honest intention of the other party. *Martine v. Christensen*, 60 Minn. 491 (62 N. W. Rep. 1127). Where the lessor was aged and illiterate, the omission of the material part of the consideration for his lease by the scrivener, which the lessor believed to be in the lease, was held sufficient ground for reformation. *Neurenberger v. Neurenberger*, Ky. (29 S. W. Rep. 617).

Sec. 729. Proof necessary. It is held that in order to justify a court of equity to so reform a deed as to include therein land claimed to have been omitted therefrom by the mutual mistake of the parties thereto, such mistake must be established by clear, satisfactory and convincing evidence; a mere preponderance is not sufficient. It may, however, be established by evidence of the circumstances and nature of the transaction, and the conduct of the parties in relation thereto, provided the natural and reasonable inferences to be drawn therefrom clearly and decidedly prove the alleged mistake. *Layman v. Minneapolis Realty Co.*, 60 Minn. 136 (62 N. W. Rep. 113). In a recent case the supreme court of Missouri say: "In order to entitle a party to a deed to its reformation upon the ground of mutual mistake in describing the land intended to be conveyed, it must be made to appear that the mistake was mutual, and the evidence of the mistake must be 'most clear and convincing.' A mere preponderance of evidence is not sufficient." *Clark v. St. Louis Transfer Ry. Co.*, 127 Mo. 255 (30 S. W. Rep. 121). Citing, *Sweet v. Owens*, 109 Mo. 1 (18 S. W. Rep. 928), and authorities cited; *Bartlett v. Brown*, 121 Mo. 353 (25 S. W. Rep. 1108), and authorities cited. In a suit to reform a mortgage which described the land as beginning "on line between sections 2 and 25 in township 14," and recited that the property so described was the same as that formerly conveyed by T. to Y., it appeared that T.'s deed described the land beginning "on line between sections 24 and 25 in township 14," and that sections 2 and 25 in township 14 were not contiguous, but that sections 24 and 25 were contiguous, it is held that a decree changing "2" to "24," on the ground of mistake, was justified. *Giselman v. Starr*, 106 Cal. 651 (40 Pac. Rep. 8).

RESULTING TRUSTS.

EPITOME OF CASES.

Sec. 730. As to the creation of resulting trusts. A statement by a husband to the effect that funds he realized from the sale of land the legal title to which he held belonged to his wife, and that he intended to buy a farm for her therewith, will not of itself create a resulting trust in her favor in land bought with such proceeds. *Acker v. Priest*, 92 Ia. 610 (61 N. W. Rep. 235). A conveyance by a father-in-law to his son-in-law for the purpose of making an equal distribution among his children will not of itself create a resulting trust in favor of the son-in-law's wife. Kan. Gen. St. 1868, Ch. 114, §§ 6-8, applied. *Acker v. Priest*, 92 Ia. 610 (61 N. W. Rep. 235). Under Minn. Gen. Stat. 1894, § 4280 (Gen. Stat. 1878, Ch. 43, § 7), where land is conveyed to one, for a consideration paid by another, no trust can arise in favor of the person paying the consideration, unless the conveyance is made to the grantee without the consent of the party paying the consideration; and a certificate of sale of school land, made by the commissioner of the state land office, pursuant to Gen. Stat. 1878, Ch. 38, § 8 (Gen. Stat. 1894, § 3967), is a "conveyance," within the meaning of such statute prohibiting resulting trusts. *Haaven v. Hoas*, 60 Minn. 313 (62 N. W. Rep. 110). Where one hires an attorney to purchase certain land for him who subsequently makes the purchase in his own name, with his own money, representing that he is buying it for his client, an enforceable trust results in favor of the latter upon his tendering to the attorney the purchase money and compensation for his services. Utah Comp. Laws, §§ 3916, 3917, applied. *Haight v. Pearson*, 11 Utah 51 (39 Pac. Rep. 479). For cases which depend upon particular facts and illustrate the doctrine of implied trusts, see *Goelz v. Goelz*, 157 Ill. 33 (41 N. E. Rep. 756); *Altoona Coal & Coke*

Co. v. Burk, 172 Pa. St. 53 (33 Atl. Rep. 326); *Dunn v. Zwilling*, Ia. (62 N. W. Rep. 746); *Goldsmith v. Alexander*, Ia. (63 N. W. Rep. 360); *Rogers v. Donnellan*, 11 Utah 108 (39 Pac. Rep. 494); *Moore v. Simonson*, 27 Ore. 117 (39 Pac. Rep. 1105); *Throckmorton v. Throckmorton*, 91 Va. 42 (22 S. E. Rep. 162); *Cobb v. Edwards*, 117 N. C. 244 (23 S. E. Rep. 241); *Kimbrough v. Nelms*, 104 Ala. 554 (16 So. Rep. 619); *Sullivan v. Evans*, Ky. (29 S. W. Rep. 619); *Gatliff v. King*, Ky. (32 S. W. Rep. 279).

Sec. 731. Transactions tainted with fraud. A voluntary conveyance either for the purpose of securing a better management of the estate or to prevent its being sold for the payment of debts cannot be made the basis of a resulting trust. *Moore v. Horsley*, 156 Ill. 86 (40 N. E. Rep. 823). If a voluntary conveyance is made for some illegal or fraudulent purpose, whether it is a common law or a modern conveyance, no trust will result to the grantor, as if the voluntary conveyance is made to hinder, delay, and defeat creditors, or to give a man a colorable qualification to vote, or to sit in parliament, or to kill game, or to disqualify the grantor for an office, or to commit any other fraud, for the reason that the rules of law cannot be used, controlled, or avoided by parties with a fraudulent intent to do that indirectly which they cannot do directly. *Sell v. West*, 125 Mo. 621 (28 S. W. Rep. 969; 46 Am. St. Rep. 508). It is held that a wife cannot have a trust declared in lands which are purchased by her husband with funds derived from the sale of land which he had conveyed to her for the sole reason of securing the same against his possible liability to creditors. *Moore v. Moore*, 165 Pa. St. 464 (30 Atl. Rep. 932).

Sec. 732. Trusts implied to prevent fraud. Whenever the legal title to property, real or personal, has been obtained through actual fraud, misrepresentations, concealments, or through undue influence, duress, taking advantage of one's weakness or necessities, or through any other similar means, or under any other similar circumstances which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity impresses a constructive

trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same; and a court of equity has jurisdiction to reach the property either in the hands of the original wrongdoer, or in the hands of any subsequent holder, until a purchaser of it in good faith and without notice acquires a higher right, and takes the property relieved from the trust. The party guilty of a fraud of this kind cannot avail himself of the statute of frauds, nor can he avail himself of the fact that the conveyance upon which he relies was executed in fraud of creditors. *Rozell v. Vansyckle*, 11 Wash. St. 79 (39 Pac. Rep. 270); *Scheerer v. Agee*, 106 Ala. 189 (17 So. Rep. 610). Where one having in his possession the money of another wrongfully converts it to his own use by purchasing real estate in his own name therewith, a resulting trust will be declared in favor of the owner of the money. *Grouch v. Hazlehurst L. Co.*, Miss. (16 So. Rep. 496). Where one accepts money from a judgment debtor with instructions to pay the judgment, but he fails to do so and allows the land to be sold and becomes a purchaser thereof, a trust results in favor of the judgment debtor, and he may maintain ejectment against the wrongdoer without tendering him the excess which he paid at the sale over and above the amount of the judgment. *Everly v. Harrison*, 167 Pa. 355 (31 Atl. Rep. 668). Particular facts held insufficient to establish a trust *ex maleficio*. *Luce v. Reed*, Minn. (65 N. W. Rep. 91). A trust *ex maleficio* can only result from some act of bad faith, and a mere refusal to perform a parol contract to hold or convey land is not sufficient to create such trust. *Barry v. Hill*, 166 Pa. 344 (31 Atl. Rep. 126). Where a deed recites a consideration and it is not shown that there is any fraud in the transaction, parol proof will not be admitted to show that the deed was, in fact, voluntary and that the grantee was to hold the title in trust for the grantor. The refusal of the grantee to perform some parol agreement is not such fraud as will authorize the intervention of a court of equity. *Weiss v. Heitkamp*, 127 Mo. 23 (29 S. W. Rep. 709). Pa. Act, Apr. 22, 1856, which prohibits any right of entry by reason of any implied or resulting trust but within five years after the trust accrued, applies to the establishment

of a trust *ex maleficio*. *Barry v. Hill*, 166 Pa. 844 (31 Atl. Rep. 126).

Sec. 733. As between parties sustaining fiduciary relations. Where a mother, under pressing circumstances, conveyed her land to her son without any consideration except a verbal understanding that he was to hold it for her benefit and the benefit of the other children, which agreement was acted upon for some time, an implied trust is created which may be enforced by the other children after the mother's death against the property or proceeds arising from a sale thereof. *Goldsmith v. Goldsmith*, 145 N. Y. 313 (39 N. E. Rep. 1067). The court say: "It may be granted that no express trust was created, and that the judgment cannot be sustained on that ground, but we think the case is one in which equity will raise out of the situation, from the grouped and aggregated facts, an implied trust to prevent and redress a fraud, and which trust will be unaffected by the statute of frauds, and may properly be enforced. The general rule was declared in *Wood v. Rabe*, 96 N. Y. 425, 426 (48 Am. Rep. 640), to be that when a person, through the influence of a confidential relation, acquires title to property or obtains an advantage which he cannot conscientiously retain, the court, to prevent the abuse of confidence, will grant relief. It was added that, while the fraud must be something more than the mere breach of a verbal agreement, yet, where the transaction is one between parent and child, and involves the greatest confidence on one side and the greatest influence on the other, the case is one in which equity may properly intervene. One of the findings in this case is 'that, at the time said deed was delivered, the defendant understood that his mother reposed confidence in him, and with that understanding accepted the conveyance and the confidence of his mother.' There is no room to doubt the truth of that finding. There was not only involved the relation of mother and son, but that of brothers and sisters, for whose benefit the agreement was made. The absence of a formal writing grew out of that very confidence and trust, and was occasioned by it, as was also the subsequent performance by the children of the condition to furnish board without pay. Upon the whole transaction, therefore, including the confiden-

tial relation of the parties and its nature as a family arrangement, very much beyond a mere business relation, we think it was competent for a court of equity to impress upon the property and its proceeds an implied trust for the benefit of the children."

Sec. 734. Payment of purchase money by one — Title in another. In order that the payment of consideration may give rise to a resulting trust, the party claiming to be the beneficiary must furnish the consideration money or some part thereof as a part of or pursuant to the original transaction and upon this point he has the burden. *Jacksonville Nat. Bank v. Beesley*, 159 Ill. 120 (42 N. E. Rep. 164); *National Bank of Greensboro v. Gilmer*, 117 N. C. 416 (23 S. E. Rep. 333). A party who had furnished means to pay for an interest in real property, purchased for certain parties contributing thereto, and of which, for convenience, the title had been taken in the name of one investor, for the benefit of all contributors, is entitled to maintain an equitable action for the enforcement of the trust which, by reason of the foregoing facts, had arisen in his favor against said associate holding title. *Leader v. Tierney*, 45 Neb. 753 (64 N. W. Rep. 226). In order to create a resulting trust on account of purchase money it is not necessary that the money be paid at the inception of the title. It is enough if it be paid as the incumbrances or installments fall due provided such payments are made in pursuance of the contract under which the title was acquired. *Gilchrist v. Brown*, 165 Pa. St. 275 (30 Atl. Rep. 839). Where a trust is established on account of the payment of the purchase money the *quantum* of the interest of the *cestui que trust* is in the proportion which the amount of his payment bears to the whole amount of the purchase money. *Collins v. Corson*, N. J. Eq. (30 Atl. Rep. 862).

Sec. 735. Purchasing at a judicial sale for the benefit of another. Where one about to purchase an infant's land at a tax sale verbally agrees with a near relative of the infant that he will purchase the land for the infant's benefit, and others are thereby deterred from bidding at such sale, he will be required to hold the title in trust for the infant. *Vanbever v. Vanbever*, Ky. (30 S. W. Rep. 983.) A

resulting trust arises where one purchases at a judicial sale, having agreed to hold the legal title for the benefit of another. *Cobb v. Edwards*, 117 N. C. 244 (23 S. E. Rep. 241). One who, at the instance of a vendee of land who was in possession under a bond for titles with none of the purchase money paid, bid off the land at a sheriff's sale, under a parol agreement with the vendee, the defendant in execution, that he would buy in the land, advance the money, and take the sheriff's conveyance to himself for the benefit of such vendee, and who, while bidding was in progress, discouraged bidding by another by stating that he was bidding in behalf of the vendee, holds as trustee for the latter such title as he derived from the sheriff, and on being paid or tendered in due time the amount of his bid, and all other moneys advanced by him in consequence of his purchase, with interest thereon, may be compelled by decree to convey the premises to said vendee by release or quitclaim deed. *Collins v. Williamson*, 94 Ga. 635 (21 S. E. Rep. 140).

Sec. 736. As between husband and wife, guardian and ward. Equity deals with the substance of things, regardless of form or methods. While an equitable estate does not easily arise out of legal forms, but where the legal forms are grounded upon equitable substance, and the rules of law do not forbid the proof, the equity remains substantial, and may be transformed into legal interests whenever chancery sees fit to so decree. So where a husband bought a farm, and had it conveyed to his wife, with the intention of paying for it himself; the wife gave her notes, secured by a mortgage on the land, to secure the payment for the farm; and the husband afterwards paid the notes out of his own money, in pursuance of an original intention, not intending the conveyance or the payment to be a gift to his wife, it was held that the wife took the fee charged with a trust in favor of the husband. *Gray v. Jordan*, 87 Me. 140 (32 Atl. Rep. 798). A resulting trust does not necessarily arise in favor of a husband from a mere payment of the purchase price by him for land which is conveyed to the wife. *Sing Bow v. Sing Bow*, N. J. Eq. (80 Atl. Rep. 867). When a husband purchases property with his wife's money, and takes the deed in his own

name, a resulting trust is raised in her favor, unless it is shown that she intended the money as a gift or loan to her husband, the establishment of which fact devolves on the husband, or those claiming under him. Mere lapse of time is not sufficient to establish a gift on her part, in so far as his collateral heirs are concerned, if he has indulged her in the belief of ownership, and allowed her to improve the property with her separate estate. *Berry v. Wiedman*, 40 W. Va. 36 (20 S. E. Rep. 817). Where a guardian purchases land with his ward's money, a resulting trust arises which cannot be defeated by his claiming a homestead in the land; and against such a trust the statute of limitations does not run. *Thompson v. Hartline*, 105 Ala. 268 (16 So. Rep. 711). Where a guardian purchases land with money belonging to his ward and takes the title in his own name a constructive trust arises in favor of the ward; but the party seeking to establish such trust must clearly and distinctly show that the purchase of the real estate was made in whole or in part with the trust funds. *Pillars v. McConnell*, 141 Ind. 670 (40 N. E. Rep. 689).

Sec. 737. Husband and wife—In fraud of husband's creditors. Cases have arisen in which courts of equity have made the property of the wife, the title to which was held in trust by the husband, liable for his debts. But these cases are not based upon the doctrine that the act of the wife in permitting the husband to carry in his own name, and of record, the title to her real estate, was a "fraud in law," but upon the doctrine that the wife, by permitting the husband to keep in his own name the title to her property, to hold it out to the world as his, to contract debts on the faith of his being the actual owner of the property, had estopped herself, in equity, against the husband's creditors deceived thereby, from claiming the property. Where a husband uses the money of his wife in paying for land, the title to which he takes in his own name, a trust will arise in favor of the wife, which a court of equity will protect against the husband's creditors, unless it is made to appear that such creditor gave the husband credit on the faith of his being the actual owner of the property of the wife, the title to which was in his name. *Hews v. Kennedy*, 48 Neb. 815 (62 N. W. Rep. 204).

Sec. 738. Proof necessary. One asserting a resulting trust in his favor has the burden of proof. *Sing Bow v. Sing Bow*, N. J. Eq. (80 Atl. Rep. 867). The facts from which the law imply a trust may be established by parol evidence. *Collins v. Corson*, N. J. Eq. (80 Atl. Rep. 862). Payment of part of the purchase money will create a resulting trust to the extent of that payment, but the amounts paid by the different parties must be shown with certainty; and a resulting trust will not be held to arise upon payments made in common with the one asserting his claim and the grantee in the deed, when the consideration is set forth in the deed as moving solely from the latter, unless satisfactory evidence is offered exhibiting the portion which was really the property of each, and establishing the fact that the payment was made for some specific part or distinct interest in the estate. To follow money into land, and impress the land with a trust, the money must be distinctly traced and clearly proved to have been invested in the land. The conversion of the trust money specifically, as distinct from other money of the trustee, into the property sought to be subjected to the trust, must be clearly shown. It does not suffice to show the possession of the trust funds by the trustee, and the purchase by him of property; that is, payment for property generally by the trustee does not authorize the presumption that the purchase was made with trust funds. *Woodside v. Hewel*, 109 Cal. 481 (42 Pac. Rep. 152).

RIGHT OF WAY.

EPITOME OF CASES.

Sec. 739. Grants of right of way—Construction of. A grant of a right of way will not be so enlarged by construction as to include a release of damages not connected in any way with the land granted. *McDonald v. Southern Cal. Ry. Co.*, Cal. (41 Pac. Rep. 812). It is held that a deed conveying "the right of way for a railroad * * * and de-

scribed as follows 'a strip of land 40 feet wide * * * and being 952 feet in length,' " although in the form of a full warranty does not convey the fee, but an easement only. *Jones v. Van Bochove*, 103 Mich. 98 (61 N. W. Rep. 842). A railroad company having purchased a right of way across the land of plaintiff, and obtained a deed for the same, is entitled to use the whole thereof for any of the purposes of said road; and the plaintiff having any buildings thereon, in the absence of any agreement with said company providing for the expense of removal thereof, must, if he desires such buildings, remove the same at his own expense. *Delsol v. Spokane & P. Ry. Co.*, Idaho (40 Pac. Rep. 59). A railroad company which enters under a deed of a married woman, void because not executed according to the statute, cannot defeat her subsequent action for damages on the ground of estoppel. *Louisville, St. L. & T. Ry. Co. v. Stephens*, 96 Ky. 401 (29 S. W. Rep. 14; 49 Am. St. Rep. 808).

Sec. 740. Possession of by company—Farm crossings. Where a railroad company has the exclusive possession of the right of way and the right to exclude the public therefrom, the mere fact that the company knew that the public was using its right of way for travel was held not to create a right in the public to continue such use. *Andries v. Detroit, G. H. & M. Ry. Co.*, Mich. (63 N. W. Rep. 526). The law determines what rights and privileges pass to the dominant owner, upon proof that the right of way was lawfully condemned for public use. One uniform rule applies, in ascertaining what has passed as incidental to the acquisition of the right of way. The dominion and privileges of a corporation have the same limit, and are subject to the same restrictions, on every part of its line, except when the right of way is granted by the owner with reservations presumably allowed by reason of the exaction of a smaller consideration than would otherwise have been charged, as where the width of the way granted is to be narrower, or the company agrees to construct crossings or cattle guards at a designated point or in a particular manner, not otherwise required. *Fleming v. Wilmington & W. R. Co.*, 115 N. C. 676 (20 S. E. Rep. 714). When a railroad company has put in, when building its railroad, a

sufficient number of suitable farm crossings and cattle guards, it cannot be required afterwards to build others at other places. When a railroad company has made gates in fencing inclosing its track to afford access to a farm crossing, the mere presence of such crossing does not require cattle guards at the crossing, there being no fences there dividing fields. *Clarke v. Ohio R. R. Co.*, 89 W. Va. 732 (20 S. E. Rep. 696).

Sec. 741. Condemnation for right of way—As to what is a public use. Under a constitutional provision making all railroads public highways, the fact that a railroad is being built by a private corporation largely for the use and convenience of private mine owners, but not to the exclusion of others, does not deprive the company of the right of eminent domain. *Butte, A. & P. Ry. Co. v. Montana*, 16 Mont. 504 (41 Pac. Rep. 232; 50 Am. St. Rep. 508; 31 L. R. A. 298). The court say: "It is well established that if, in point of law, a use is public, the fact that not very many persons will enjoy the use is not material. *Talbot v. Hudson*, 16 Gray 417. The character of a way, whether it is public or private, is determined by the extent of the right to use it, and not by the extent to which that right is exercised. If all the people have the right to use it, it is a public way, although the number who have occasion to exercise the right is very small. *Phillips v. Watson*, 68 Iowa 28 (18 N. W. Rep. 659); *Lewis Em. Dom.*, p. 241; *Shaver v. Starrett*, 4 Ohio St. 496; *Kettle River R. Co. v. Eastern R. Co.*, 41 Minn. 461 (43 N. W. Rep. 469); *Rand. Em. Dom.*, § 56."

Sec. 742. Condemnation of right of way—Rights of land owners. The nature and extent of the rights and easements acquired by a railroad company by the condemnation of lands for the purpose of its road must be definitely shown in the written report of their proceedings filed by the commissioners who make the condemnation. The report must show what is taken, and what the landowner parts with. Nothing is taken by implication or intendment, and parol evidence to show that the commissioners intended to condemn other land, not included in their report, is inadmissible. *C. G. Larned Mer. R. Est. & L. S. Co. v. Omaha, H. & G. R. Co.*, 56 Kan. 174 (42 Pac. Rep. 712). It is held that in proceedings

to condemn a right of way, the title does not vest in the railway company until compensation assessed has been paid into court. *Jones v. Miller*, Va. (28 S. E. Rep. 85). Where the land is condemned for a railroad right of way the company does not take the owner's estate in the minerals, nor does it deprive him of his right to work the ground for such minerals provided he can do so without interfering with the easement of the right of way. *Northern Pac. & M. Ry. Co. v. Forbis*, 15 Mont. 452 (39 Pac. Rep. 571; 48 Am. St. Rep. 692). In Pennsylvania the statute providing for the condemnation of railroad right of way provides that the same shall not pass "through any burying ground or place of public worship or any dwelling house in occupancy of the owner or owners thereof without his, her or their consent." Construing and applying this statute it is held, that the words "dwelling house" do not include the barn and out buildings necessary to its reasonable enjoyment as a place of dwelling by the owner. *Rudolph v. Pa. S. V. R. Co.*, 166 Pa. St. 480 (81 Atl. Rep. 181).

Sec. 743. Condemnation of another right of way. Under the general statutes of Michigan, one railway company has no authority to condemn the lands of another occupied or used or necessary for the prosecution of its railroad business except for the purpose of a crossing. *Minneapolis & St. L. Ry. Co. v. Minneapolis W. Ry. Co.*, 61 Minn. 502 (68 N. W. Rep. 1035). The court say: "There may be instances where public necessity is of such a nature that one railroad company might be empowered to condemn and appropriate the property of another, but it would require a legislative enactment to authorize such a proceeding. If one railroad company could, at its option, condemn the property of another railroad company, we do not see why such proceedings could not be continued as often as each different company desired. The law of eminent domain does not sanction any such absurdity, especially where the public use sought is identical with the one already enjoyed. Our statute expressly authorizes one railroad company to cross the tracks of another, but that is a temporary use, and one frequently of absolute necessity, and does not materially interfere with the other railroad's

enjoyment of its property. In addition to this general rule of law this question is settled by a legislative enactment of our own state. Gen. St. 1894, § 2647, contains this provision, viz., 'provided that nothing in this act contained shall be construed as authorizing or empowering said railroad company or any of them to condemn, appropriate or use any land, property or rights or franchises of any other railroad corporation occupied over use or necessity for the operation of its railroad, or the transaction of its business by such other corporation.' This law is applicable to corporations created by special charter as well as those organized under the general laws of the state. Id., § 2656." See Eminent Domain Ante., § 223.

Sec. 744. Damages. In condemnation proceedings the landowner receives only such damages as he would receive by the proper construction and operation of a road. Damages which subsequently result from an improper diversion of waters are not presumed to have been included in the condemnation proceedings. *Kansas City M. & B. R. Co. v. Lackey*, 72 Miss. 881 (16 So. Rep. 909; 48 Am. St. Rep. 589). The right to have damages assessed is a property right which may remain in the person to whom it has accrued after he has parted with his title to the land, or it may be assigned by him to another by a conveyance of the land. *Frey v. Duluth, S. S. & A. Ry. Co.*, 91 Wis. 809 (64 N. W. Rep. 1038). Where a railroad is to be constructed across town lots, the jarring, smoke, noise and dust of passing trains incident to the ordinary use of the road and its proximity to buildings, may be considered in estimating the damages. *Comstock v. Clearfield & M. Ry. Co.*, 169 Pa. St. 582 (32 Atl. Rep. 431). Where a railroad is located through lands which are in cultivation and buildings, or fences, or crops are exposed to fire from passing trains and the lands are thus rendered less valuable in the market, such matters may be taken into consideration in determining what compensation should be paid the landowner. *Chicago, P. & M. R. Co. v. Atterbury*, 156 Ill. 281 (40 N. E. Rep. 826).

Sec. 745. Damages—Platted lands. Where a railroad has been located and constructed upon land which apparently forms an undivided and improved tract, but which the

joint owners for the purpose of partition had platted into lots and blocks with streets and alleys, which plat had never been recorded and was subject to change at any time, it is held that the joint owners may have maintained joint proceedings for the assessment of damages; but that by a proceeding by one of the cotenants he could only recover damages for the portion actually taken and could recover no damages on the theory that the streets, alleys and lots were in fact such. *Phillips v. St. Clair Incline-Plane Co.*, 166 Pa. St. 21 (81 Atl. Rep. 69).

Sec. 746. Estoppel as against the land owner. It is held that where the owner of land has by express or tacit consent permitted a railway company to enter thereon, construct its road bed and track and occupy the same for the purpose of a railroad he has thereby, in effect, waived and lost his former remedies at law and in equity, and is relegated to proceedings under the statute to have his compensation assessed. *Frey v. Duluth, S. S. & A. Ry. Co.*, 91 Wis. 809 (64 N. W. Rep. 1088). Conduct which will estop a landowner from asserting his title will estop him from maintaining an action for damages. *Norfolk & W. R. Co. v. Perdue*, 40 W. Va. 442 (21 S. E. Rep. 755). In a recent case the supreme court of Missouri say: "Mere silence or inaction of the owner whose land has been invaded will not debar him of the use of any of the machinery of the law, whether legal or equitable, created for his protection. But where such owner goes forth to meet the invading party of railroad constructors, sees them doing acts of which every blow of the ax and every thrust of the spade is a trespass, and yet does not forbid such being done, but, on the other hand, holds converse with the representative of the railroad company, enters into negotiations with him, and, though these negotiations are unsuccessful, relies on the assurance of future compensation made by such representative, thereby waiving prepayment which otherwise he might demand and secure, and suffers the work to go on without protest or hinderance, such owner, according to all our rulings, though he may recover for the damages done his property, cannot maintain ejectment, and oust the company whose acts, except at the unlawful outset, have been done

under the sanction of an unequivocal, though implied, permission of the owner." *Scarritt v. Kansas City & S. Ry. Co.*, 127 Mo. 198 (29 S. W. Rep. 1024).

Sec. 747. Right to exclusive possession of as applied to streets and highways. The presumption arising under the general railroad laws that a railroad company takes, when it enters by virtue of the right of eminent domain, the full breadth of 60 feet for its right of way, is only applicable where the entry is adverse, and upon property subject to seizure or appropriation under the general laws. . It does not apply to an entry upon a public street, whether made under the authority of the act of assembly incorporating the company, or by virtue of municipal consent. In either case, in the absence of express words, or their equivalent, giving an exclusive right to the street, or to a defined part of it, the grant, whether legislative or municipal, will be construed most strongly against the grantee, and most favorably in aid of the previously existing public right of passage. The commonwealth is the owner of the public highways. The municipality is charged with the duty of laying out and maintaining such highways as are necessary to accommodate the public within its territorial limits. A grant to a corporation of a privilege upon a highway, such as to enter, cross, or pass along it, is, in the absence of clearly expressed intention to the contrary, a grant subject to the existing public right of use, and is to be exercised in such manner as shall interfere as little as possible with those for whose benefit the way was originally laid out and opened. *Jones v. Erie & W. Va. R. Co.*, 169 Pa. St. 333 (32 Atl. Rep. 535; 47 Am. St. Rep. 916).

Sec. 748. Crossings—Streets—Street railways—Other railroads. Where a municipality extends a street across a railroad right of way and the railway company retains the right to use the land as before and any other use thereof being speculative, only nominal damages can be recovered. *Chicago & N. W. R. Co. v. Town of Cicero*, 157 Ill. 48 (41 N. E. Rep. 640). It is held that the legislature may authorize an electric street railway company to cross at the grade, a steam railroad, without providing compensation for the injury to such railroad, occasioned by such crossing. *New York, N*

H. & H. R. Co. v. Bridgeport Traction Co., 65 Conn. 410 (32 Atl. Rep. 958; 29 L. R. A. 867). The granting by a railway company to a street car company the right of a crossing for a surface road does not authorize the subsequent use of a trolley which interferes with the use of the railroad gate; nor will the use of such crossing by the street car company with a trolley for a short time, pending negotiations for permanent rights, create any estoppel. *Port Richmond & P. P. Elec. R. Co. v. S. I. R. T. R. Co.*, 144 N. Y. 445 (39 N. E. Rep. 392). Under the act concerning the taking of property for public use, approved March 9, 1893 (P. L. 161), a defined plan of crossing another railway by a condemning railroad company may be amended before appeal, before the trial thereof, so as to facilitate the operation of both railroads. Where a crossing through the right of way of another railroad company is sought by a condemning company, future demands upon that right of way, which are fairly and reasonably certain, are to be regarded by the tribunal which determines the just compensation to be awarded in reaching its conclusion. *National Docks & N. Y. Y. C. Ry. Co. v. Pa. R. Co.*, 57 N. J. L. 637 (32 Atl. Rep. 274). As to what may be shown in evidence on the question of damages in a proceeding by a city to condemn a portion of a railroad right of way for street purposes, see *Illinois Cent. R. Co. v. Chicago*, 156 Ill. 98 (41 N. E. Rep. 45); *Grand Rapids v. Bennett*, Mich. (64 N. W. Rep. 585). Where two railway companies possess a community of interest in the land upon which they cross each other, and disagreement or misunderstanding arises between them as to their respective rights of use of the same, the court of chancery will control and regulate the use of the land by them, according to their respective rights. If the court of chancery is satisfied that the railway company which invokes its aid is proceeding in the acquisition of its right of way, and in the construction of its road, in good faith, and with apparent ability to expeditiously and properly perform its work at the crossing, it will not refuse its assistance in the enjoyment of its right in the crossing merely because it has not yet secured a right of way over the entire route. *National Docks & N. Y. Y. C. Ry. Co. v. Pa. R. Co.*, N. J. Eq. (30 Atl. Rep. 1102).

Sec. 749. Crossing highways and streets—Duty of railroad to keep crossing in repair and maintain approaches—Statute construed—Approaches defined. The Illinois statute, § 8, Act 1874, 2 Starr & C. Ann. St., p. 1937, is as follows: "Hereafter, at all the railroad crossings of highways and streets in this state, the several railroad corporations in this state shall construct and maintain said crossings, and the approaches thereto, within their respective rights of way, so that at all times they shall be safe as to persons and property." Construing this statute it is held that railroad companies are not required to maintain approaches as wide as all of that portion of the street or highway which is within the limits of the railroad right of way, but only so much as is reasonable; and what is reasonable in any particular case is to be determined by the facts. *City of Bloomington v. Illinois Cent. R. Co.*, 154 Ill. 539 (39 N. E. Rep. 478). The court say: "In *Chicago & N. W. Ry. Co. v. City of Chicago*, 140 Ill. 309 (29 N. E. Rep. 1109), we sustained this section of the statute, as being a valid exercise of the police power. We there said: 'The requirement, embodied in section 8, that railroad companies shall construct and maintain the highway and street crossings, and the approaches thereto, within their respective rights of way, is nothing more than police regulation. It is proper that the portion of the street or highway which is within the limits of the railroad right of way should be constructed by the railroad company, and maintained by it, because of the dangers attending the operation of its road. It should control the making and repairing of the crossing for the protection of those passing along the street, and of those riding on the cars. Section 8 recites that the railroad companies shall construct and maintain the crossings, so that at all times they shall be safe as to persons and property. Safety of persons and property is the object of the requirement. The grading of the approaches and planking between the rails and tracks make it possible for men and teams to cross easily and quickly and thus avoid collision with passing trains, thereby insuring their own safety and the safety of the persons and property upon the trains.' In what sense is the expression 'and the approaches thereto' used in this statute? The approaches to a bridge are the ways at the ends of it, which are parts of the

bridge itself, or are appendages to it. *Com. v. Inhabitants of Deerfield*, 6 Allen 449; *Witcher v. City of Somerville*, 138 Mass. 454; *Driftwood Val. Turnpike Co. v. Board of Com'rs*, 72 Ind. 226. The words 'approaches to a bridge' are in common and general use, and they are naturally and ordinarily understood to refer to the adjuncts, of whatever material constructed, at the ends of the bridge, which furnish a passage or way by which to approach the bridge itself. When applied to the subject-matter of a railroad crossing, the word 'approaches,' as it is commonly used and understood, has a like signification and meaning; it means the embankments or bridges or grades or structures of any sort, on each side of the railroad at the crossing, which serve as the passageway for approaching the crossing."

Sec. 750. Forfeiture of right of way. A conveyance of a right of way, "so long as the same shall be used for the operation of a railroad," with the right in the grantor to cross and recross, is the conveyance of a mere easement, and where it contains the provision that the grantee shall complete the road within a given time, such a condition is a condition subsequent and not a covenant; and upon its breach either the grantor, his heirs, or their grantees and assigns may maintain an action to forfeit the grant. *Reichenbach v. Washington S. L. Ry. Co.*, 10 Wash. St. 357 (38 Pac. Rep. 1126). Cal. Civ. Code, § 502, provides that where a franchise has been granted to a street railroad, work on the road must be commenced within one year from the date of the grant of the right of way and finished within three years thereafter, and that a failure to comply with such provision works a forfeiture of the right of way as well as of the franchise. Construing and applying this statute it is held that where a street railroad fails to comply with its provisions the forfeiture cannot be insisted upon until declared by a court or by legislative authority, the statute not being self-executing. *Santa Rosa City R. Co. v. Cent. St. Ry. Co.*, Cal. (38 Pac. Rep. 986).

Sec. 751. Abandonment of. Where the rails, ties, fences and bridges pertaining to a railroad are removed, it is sufficient to show an abandonment of the easement of the right of way. *Jones v. Van Bochove*, 103 Mich. 98 (61 N.W. Rep.

842). Where the consideration of a deed conveying a right of way to a railroad company was, as expressed in the deed itself, the benefits which were expected to accrue to the landowner from the construction of the contemplated railroad, and there was an express promise on the part of the company to construct the road, by virtue of which promise the conveyance was procured, and also a parol license to cut cross-ties induced, a breach of the contract by failing to construct the road, abandoning work upon it, and selling out to a rival company, with intent that the whole enterprise should be suppressed and forever abandoned, constitutes a cause of action in behalf of the landowner to the extent, at least, of having decreed a cancellation of the conveyance, and of having awarded to him compensation for any damage done to the land by severing timber and cross-ties therefrom, and digging up the soil, or by other means, while the work of construction was in progress. *Savannah, F. & W. Ry. Co. v. Atkinson*, 94 Ga. 780 (21 S. E. Rep. 1010). In a well considered case the authorities are reviewed and it is held that a grant of a strip of land to a railroad company, "for right of way and for operating its railway only," gave to the grantee a mere easement in such strip, and that the conveyance by a railroad company of a part of its right of way, in which it had but an easement expressly limited to the operation of its own road, to a distinct and independent railroad company, which built, and has ever since operated, its line of railroad on the land conveyed to it, was an abandonment of such part by the railroad company first referred to; and, as against that last indicated, the original proprietor, through whom both companies claim their rights, is entitled to compensation with respect to the part occupied and used by the company last indicated. *Blakely v. Chicago, K. & N. R. Co.*, 46 Neb. 272 (64 N. W. Rep. 972).

Sec. 752. Sale of right of way as distinguished from a lease thereof. In a recent case it is held by a divided court that where a land owner granted a right of way to a railway company upon condition that upon the sale of the same by the company he should receive one half of the proceeds, and the company after constructing its road leased the same to another company for nine hundred and ninety-nine years, such lease

was not a sale within the meaning of the condition in the grant. *Morrison v. St. Paul & N. P. Ry. Co.*, Minn.

(65 N. W. Rep. 141; 80 L. R. A. 546). In the able dissenting opinion the learned judge says: "The practical difference between a lease for such a long time and a sale is too dim and gauzy, and should not be tolerated, because, in my opinion, it is of those attempted multiform methods of practicing fraud under the guise of legal formality which should not receive judicial sanction." A number of authorities are cited on both sides of the question.

RIPARIAN OWNERS.

EPITOME OF CASES.

Sec. 753. Uses of waters and banks—Rights in respect to. A riparian owner may make any reasonable use of the water as it flows through his land, even to the extent of selling it to others so long as the equal rights of another riparian owner to the enjoyment of the water is not injuriously affected. As to whether a use is reasonable is a mixed question of law and fact. *Gillis v. Chase*, N. H. (31 Atl. Rep. 18). A riparian owner is entitled to the natural flow of the water of a navigable stream subject to such interference as is caused by the use of the water for navigation in the usual manner. *Wooden v. Mt. Pleasant L. & Mfg. Co.*, Mich. (64 N. W. Rep. 329). It is held that a riparian owner cannot exclusively occupy land lying between high and low water marks by a permanent structure foreign to the purposes of navigation, even though there is no material appropriation of navigable water or of shore line. *Commonwealth v. Young M. C. Ass'n*, 169 Pa. St. 24 (32 Atl. Rep. 121). It is held that land lying between a levee and the river, although submerged at the high stage of the river, is the property of the riparian proprietor subject to be used, and if used by the riparian owner or if he derives revenue therefrom is subject to taxation. *Mathis v. Bd. of Assessors.*, 46 La. 1570

(16 So. Rep. 454). In Arizona the common law doctrines as to riparian rights were expressly abrogated by Rev. Stat., § 8198. *Austin v. Chandler*, Ariz. (42 Pac. Rep. 488). Under a statute which provides the extent and mode within which riparian owners may make improvements in front of their lots and declares what the front may be upon a concave shore, it is held that where a riparian owner pursuant to an ordinance makes such improvements as it authorized, his right to the use of the same becomes vested and cannot be taken from him by subsequent enactments. Permission given to a riparian owner by the city to improve his water front by the construction of a pier may be revoked at any time before the improvement is constructed. *Classen v. Chesapeake Guano Co.*, 81 Md. 258 (81 Atl. Rep. 808).

Sec. 754. Deep water lines—Rights in respect to. A riparian owner does not waive his right to have a "deep water line" fixed, in fact, on deep water, by the fact that it has been erroneously fixed, and he has obtained from the state a grant based upon such erroneous line. The right to have the line run to deep water is not only personal to the riparian owner, but is a right in which the public is also interested. *Wool v. Town of Edenton*, 117 N. C. 1 (23 S. E. Rep. 40). The court say: "Outside of any right conferred by § 2751 of the North Carolina Code, a qualified property in the lands covered by water in front of his high land up to the deep-water line, he ought not to be estopped from having his rights of property fixed up to the deep-water line in cases where the state's agents have already fixed the line which is not the true one. Estoppels are not favored, and especially are they discouraged in cases where they would occasion injury to the public, in addition to individual loss and damage. The town authorities would not be permitted to arbitrarily locate an imaginary deep-water line away from the navigated part of the bay, and without making the water navigable up to that line, and thus deprive riparian owners of the right to build wharves to it, that they may avail themselves of the advantages of the navigable waters."

Sec. 755. Accretion and alluvion—Avulsion. Where the land has been washed away and reforms by a deposit, it

belongs to the riparian owner even though a slough remains between the main land and the new formation, including accretion to such new formation. *Minton v. Steele*, 125 Mo. 181 (28 S. W. Rep. 746). The accretion must form to the land owned by the riparian owner and not to an island which he does not own. *Cox v. Arnold*, 129 Mo. 837 (31 S. W. Rep. 592; 50 Am. St. Rep. 450). The fact that an obstruction placed in the river by third parties caused the accumulation of accretion to land, does not prevent the riparian owner from acquiring title thereto. *Tatum v. St. Louis*, 125 Mo. 647 (28 S. W. Rep. 1002). The rule is, in order to entitle the adjoining property holders to the right of possession of land left bare by the receding water, that the recession must be gradual, slow and imperceptible. In case of a sudden and sensible recession of the water, the ownership of the land will not be changed. *Noyes v. Collins*, 92 Ia. 566 (61 N. W. Rep. 250; 26 L. R. A. 600). Citing, *Warren v. Chambers*, 25 Ark. 120 (91 Am. Dec. 538; 4 Am. Rep. 23); *Murry v. Sermon*, 1 Ruff. & H. 56; *Boorman v. Sunnuchs*, 42 Wis. 283; *Gill v. Lydick*, 40 Neb. 508 (59 N. W. Rep. 104).

Sec. 756. Public easement for floatage. It is not necessary, in order to establish an easement in a river, to show that it is susceptible of use continuously during the whole year for the purpose of floatage, but it is sufficient if it appear that business men may calculate with tolerable regularity as to the seasons the water will rise and remain at such a height as will enable them to make it profitable to use it as a highway for transporting logs to market or mills lower down. If the freshet should arise from natural rainfall for a sufficient period to make it useful to the public, it would be considered a floatable stream. Temporary rise, passing quickly down, is not sufficient to make a stream floatable, and would not be sufficient if the freshet should continue up for even two or three days, and be reasonably expected every year. *Commissioners of Burke Co. v. Catawaba L. Co.*, 115 N. C. 590 (20 S. E. Rep. 707). Reviewing this case upon a rehearing the court say: "The governing principle is that the right to the use of a water highway for the transportation of timber, is subject to the maxim that we must so use our own as to avoid

needless injury to another. The public have the paramount right of way in the public roads; yet that does not excuse one driving a carriage or wagon over it for needlessly injuring a person or even an animal that is temporarily obstructing it. *Davies v. Mann*, 10 Mees. & W. 545. It remains for us to determine in each case that may hereafter arise what is culpable carelessness in the enjoyment of this easement. We adhere to the announcement made by the court in the opinion which we are now reviewing (*Commissioners of Burke Co. v. Catawaba L. Co.*, 115 N. C. 590 (20 S. E. Rep. 707, 847), that the right of floatage must 'be exercised with due care for the avoidance of injury to the interests of the riparian proprietors and the owners of the soil beneath the bed of the stream

* * * And, on the other hand, it would seem that if these were floatable streams, in which the public has an easement for transportation, it would be the duty of the county commissioners, certainly in the absence of express authority to the contrary, to so construct bridges on the highways as to permit the use of rivers for the purpose of floatage.' If the streams are highways, then bridges constructed over them so as, by interposing a barrier to floating logs every time the rivers rise sufficiently high to carry them over the shoals, to practically prevent their use by the public, are unlawful obstructions. 6 Lawson, Rights, Rem. & Prac., § 2936; *Kean v. Stetson*, 5 Pick. 492; *Charlestown v. Middlesex Com'rs*, 3 Metc. (Mass.) 202. The case last cited was one where the county commissioners acted under the authority of an act passed by the legislature of Massachusetts, empowering them especially to build the bridge, but not specifying its character; and Chief Justice Shaw, in a strong opinion, announced the principle that the county authorities were not warranted in so constructing the bridge as to obstruct the use of the stream as a highway." *Comm'rs of Burke Co. v. Catawaba L. Co.*, 116 N. C. 731 (21 S. E. Rep. 941; 47 Am. St. Rep. 829). In Alabama it is held that a fresh water stream above tide water is navigable and a public highway when and only when it is susceptible of being used in ordinary condition for a highway of commerce over which there may be trade, travel, transportation, or valuable floatage; and while it may not be capable of being so used for the entire year, it must, for a season, or a considerable part of

the year contain that depth of water which fits it for such transportation. *Bayzer v. McMillan Mill Co.*, 105 Ala. 395 (16 So. Rep. 928). See Waters—Navigable streams—Rights of loggers.

Sec. 757. Pollution of waters. To a bill by a riparian proprietor to restrain defendant from polluting, by discoloration, the stream, it is no defense or equitable excuse that the discoloration is the natural and necessary result of mining operations prosecuted in the ordinary way. The doctrine finally adopted in Pennsylvania in the case of *Coal Co. v. Sanderson*, 118 Pa. St. 126 (6 Atl. Rep. 458), is not the law in this state. Nor can the defendant set up that other independent causes are already operating to pollute. *Beach v. Sterling I. & Z. Co.*, N. J. Eq. (38 Atl. Rep. 286). An upper riparian owner has no right to pollute the water by the maintenance of a stable and stock pens on the banks of the stream. *People v. Elk River M. & L. Co.*, 107 Cal. 214 (40 Pac. Rep. 486; 48 Am. St. Rep. 121).

Sec. 758. Riparian rights upon diversion of stream by natural causes. It is held that where the course of a stream upon the land of the upper riparian owner is changed by natural causes the lower riparian owner has no right to enter upon the lands of the upper owner for the purpose of restoring the stream to its original course. *Wholey v. Caldwell*, 108 Cal. 95 (41 Pac. Rep. 81; 30 L. R. A. 820). The court say: "A somewhat extended examination leads to the conclusion that the assertion of such a right is new to jurisprudence. The right finds no recognition by the commentators of either the civil or common law, and no case has come under our observation in which the question is considered. Even Sir Mathew Hale, whose *De Jure Maris* is declared by Chancellor Kent to have exhausted the learning on the subject, makes no mention of so important a topic. This silence is itself significant; for it is not easily to be believed that if this important right exists it would not have been asserted and announced in numerous instances. While thus lacking in authority, it is certain that the contention cannot find better support from principal or reason."

Sec. 759. Improvement of tide lands — Right to purchase. The statute of Washington, Laws 1889-90, p. 435, § 11, provides that where valuable improvements have been made on tide lands by any person, the owner of such improvements shall have the exclusive right to purchase the lands so improved. It is held that this statute applies only to land improved at the time of its passage; that the driving of piles by a saw mill company out in the water for the purpose of securing rafts of logs is not such an improvement of tide lands as is contemplated by the statute; and that the statute contemplates that the property sought to be purchased shall be converted into solid land. *Globe Mill Co. v. Bellingham Bay Imp. Co.*, 10 Wash. St. 458 (38 Pac. Rep. 1112). No contractual rights are created by this statute. *State v. Forrest*, 12 Wash. St. 488 (41 Pac. Rep. 194). The right to purchase tide lands under this statute is limited to the holder of the legal title and is not available to a judgment creditor who has purchased upon execution sale before the expiration of the time allotted to his debtor for redemption. *Hays v. Merchants' Bank*, 10 Wash. St. 573 (39 Pac. Rep. 98). This statute is held to be a constitutional and legal exercise by the state of its dominion over the lands under navigable waters. *As-toria Exch. Co. v. Shivley*, 27 Ore. 104 (39 Pac. Rep. 398). One who purchases by a plat is estopped to claim tide lands beyond the lines of the lot conveyed to him in consequence of such purchase. *State v. Forrest*, 12 Wash. St. 488 (41 Pac. Rep. 194).

STARTING FIRES.

EPITOME OF CASES.

Sec. 760. Liability of railroads for fires—Negligence. In Texas it is the established law that, when fire is set out by sparks from an engine on a railroad, the law presumes negligence and the plaintiff is entitled to recover for damages done by the fire so set out, unless the railroad company shall prove

that its engine was provided with the best approved apparatus for arresting sparks and preventing their escape, and properly operated. *Texas & P. Ry. Co. v. Levine*, 87 Tex. 437 (29 S. W. Rep. 466). Substantially the same is held in North Carolina. *Blue v. Aberdeen & W. E. R. Co.*, 117 N. C. 644 (28 S. E. Rep. 275). The inference of negligence arising from the fact that the fire was set by sparks from defendant's engine is overcome by undisputed evidence that the engine was properly constructed and equipped, was carefully inspected the day before the fire and found to be in proper order and was properly managed. *Menomonie R. S. & D. Co. v. Milwaukee & N. R. Co.*, 91 Wis. 447 (65 N. W. Rep. 176). Where fire is shown to have originated from a worn and defective spark arrester which had caused previous fires, a *prima facie* case of negligence is made against the company without showing that it had knowledge of such defective condition or that it could have discovered it by the exercise of ordinary care. *Louisville, N. A. & C. Ry. Co. v. McCorkle*, 12 Ind. App. 691 (40 N. E. Rep. 26). In order for the negligence of the plaintiff to excuse the defendant from liability there must exist a real proximate casual connection between such negligence and the injury complained of. Mere remote negligence, such as a failure to take precaution against the negligence of the defendant, will not protect him. Kan. Gen. Stat. 1889, § 1321, applied. *Union Pac. Ry. Co. v. Eddy*, 2 Kan. App. 291 (42 Pac. Rep. 413). Citing, Beach, Contrib. Neg., §§ 10, 11; Whart. Contrib. Neg., §§ 823-833; *Savage v. Insurance Co.*, 86 N. Y. 665; *Norris v. Litchfield*, 35 N. H. 271 (69 Am. Dec. 546); *Railway Co. v. Fire Ass'n*, 55 Ark. 178 (18 S. W. Rep. 43); *Railway Co. v. Houts*, 12 Kan. 328; *Railway Co. v. Tubbs*, 47 Kan. 680 (28 Pac. Rep. 612). Where both parties have been guilty of direct and proximate negligence the law will not compare the degrees of negligence. *Missouri Pac. Ry. Co. v. Haynes*, 1 Kan. App. 586 (42 Pac. Rep. 259). In an action against a railroad company under Minn. Gen. Stat. 1894, § 2700 (Gen. Stat. 1878, Ch. 34, § 60), to recover damages caused by fire thrown from its cars or engines the company has the burden of showing the want of defect in their engines and the absence of negligence on the part of their employees. *Weber v. Winona & St. P.*

R. Co., Minn. (65 N. W. Rep. 98). Minn. Gen. Stat. 1894, § 2700, applied—presumption as to negligence. *DeCamp v. Chicago, St. P. M. & O. Ry. Co.*, Minn. (64 N. W. Rep. 392). Particular fact case in which the owner of a wooden building located near a railroad track and used for a planing mill was held entitled to recover for its destruction by fire from a railroad engine. *Briant v. Detroit, L. & N. R. Co.*, 104 Mich. 307 (62 N. W. Rep. 865).

Sec. 761. Liability of railroads for fires—Property “along the route” defined. In considering Me. Rev. Stat., Ch. 51, § 64, which makes railroad companies liable for injury by fire to, and gives them an insurable interest in, property “along the route” of the road, the supreme court say: “The construction of this statute has been brought directly in question in several reported cases in this state. *Chapman v. Railroad Co.*, 37 Me. 92; *Pratt v. Railroad Co.*, 42 Me. 579; *Lowney v. Railroad Co.*, 78 Me. 479 (7 Atl. Rep. 381); *Thatcher v. Railroad Co.*, 85 Me. 502 (27 Atl. Rep. 519). In *Pratt v. Railroad Co.*, 42 Me. 579, the interpretation of the phrase, ‘along the route,’ was critically considered in the light of etymology and lexical definition, as well as of the rules of legal construction and judicial precedent; and it was there determined, in accordance with the decision in *Hart v. Railroad Co.*, 13 Metc. (Mass.) 99, that as the legislature manifestly designed to afford no greater security to property situated very near the railroad track than to that which was more remote, provided each was equally exposed, and as it had prescribed no particular distance, beyond which the railroad company was not liable, the definition of these terms must be found in the answer to the question. ‘Was the property destroyed so near to the route of the railroad as to be exposed to the danger of fire from the engine?’” *Martin v. Grand Trunk Ry. of Canada*, 87 Me. 411 (32 Atl. Rep. 976).

Sec. 762. Actions for injuries by fire—Pleading and practice. One who holds title to land by adverse possession may maintain an action for injury thereto by fire. *Rushby v. Florida Cent. & P. R. Co.*, S. C. (23 S. E. Rep. 50).

Actual possession is sufficient proof of title. *Spirlock v. Fort Townsend S. R. Co.*, 18 Wash. 164 (42 Pac. Rep. 520). Where the plaintiff shows that he owns the land injured in connection with others he must show what his particular interest is. *Comer v. Newman*, 95 Ga. 434 (22 S. E. Rep. 634). In an action to recover damages from fire alleged to have been caused by sparks from a chimney the plaintiff has the burden to show that such was the cause of the fire. *Pueblo L. H. & P. Co. v. McGinley*, Colo. App. (38 Pac. Rep. 425). The mere fact that the territory burned over is adjacent to a railroad does not create a presumption that the fire was caused by its trains. *Missouri Pac. Ry. Co. v. Haynes*, 1 Kan. App. 586. In an action to recover damage for property destroyed by fire set out by a railroad company it is proper to modify an instruction making its liabilities dependent upon whether the fire was set out under circumstances "customary with prudent railroad men" by striking out the word "railroad;" and an instruction "if the fires were carefully set and carefully guarded, there can be no recovery," is erroneous as it omits any reference to the propriety of setting the fire at the time. *Cole v. Lake Shore & M. S. Ry. Co.*, Mich. (63 N. W. Rep. 647). Where a court in its instructions to the jury makes the liability of railroad for an injury by fire dependent upon whether the wind occasioning it was "unusual and extraordinary," the meaning of the words should be explained. *Blue v. Aberdeen & W. E. R. Co.*, 116 N. C. 955 (21 S. W. Rep. 299). In an action for damages against a railroad company resulting from the spreading of fire started on its right-of way the complaint must allege that the company negligently allowed the fire to escape from its right of way. *Louisville, N. A. & C. Ry. v. Roberts*, 13 Ind. App. 692 (42 N. E. Rep. 247); *Louisville, N. A. & C. Ry. Co. v. Palmer*, 13 Ind. App. 161 (39 N. E. Rep. 881). An allegation that the defendant "negligently permitted a fire to be communicated from their engines or property to the lands adjoining their railroad and right of way, by which said fire the spread and extension thereof," plaintiff's property was burned and destroyed was held sufficient. *Black v. Aberdeen & W. E. R. Co.*, 115 N. C. 667 (20 S. E. Rep. 713). Allegations which show that the injury resulted from

the negligent acts of the company's employees are insufficient unless it is alleged that such acts were performed while they were engaged in the line of their employment. *Louisville, N. A. & C. R. Co. v. Palmer*, 18 Ind. App. 161 (39 N. E. Rep. 881). Where the complainant charges specifically that the fire originated on account of the carelessness and negligence of the defendant in the management and control of its locomotive the defendant is not required to show that the locomotive was sufficient and in good condition and repair, but only that it was carefully and properly managed and controlled. *Atchison, T. & S. F. R. Co. v. Ayres*, 56 Kan. 176 (42 Pac. Rep. 722). S. C. Gen. Stat., § 1511 (Rev. Stat., § 1688), giving a landowner a right of action for injury to property by fire communicated to it from a fire originating on the property of a railroad company, independent of the question of negligence, does not supersede the right of action at common law based upon negligence, but where one brings an action under the statute he will not, after an action founded on negligence has been barred by limitation, be allowed to amend his complaint by striking out the allegations therein referring to the statute, and inserting in place thereof an allegation that the injury was caused by defendant's negligence. *Mayo v. Spartanburg, U. & C. R. Co.*, 48 S. C. 225 (21 S. E. Rep. 10). In the absence of a statute so authorizing interest cannot be recovered on a claim for damages by fire. *Atchison, T. & S. F. R. Co. v. Ayers*, 56 Kan. 176 (42 Pac. Rep. 722). Kan. Gen. Stat. 1889, Par. 1822, applied—recovery of attorney fees. *Atchison, T. & S. F. R. Co. v. Huitt*, 1 Kan. App. 788 (41 Pac. Rep. 1051). Kan. Gen. Stat. 1889, Par. 1821, applied to cases depending on particular cases. *Atchison, T. & S. F. R. Co. v. Huitt*, 1 Kan. App. 781 (41 Pac. Rep. 1049); *Atchison, T. & S. F. R. Co. v. Huitt*, 1 Kan. App. 788 (41 Pac. Rep. 1051). The defective condition of a railroad engine may be shown by proof of its having caused previous fires. *Louisville, N. A. & C. Ry. Co. v. McCorkle*, 12 Ind. App. 691 (40 N. E. Rep. 26). See on this point *Mcmonie R. S. & D. Co. v. Milwaukee & N. R. Co.*, 91 Wis. 447 (65 N. W. Rep. 176). Evidence that the defendant has paid others for losses arising from the same fire is inadmissible. *Louisville, N. A. & C. Ry. Co. v.*

Roberts, 18 Ind. App. 692 (42 N. E. Rep. 247). Particular fact cases in which the evidence is held insufficient to sustain an action against a railroad company. *Stratton v. Union Pac. Ry. Co.*, 7 Colo. App. 126 (42 Pac. Rep. 602).

Sec. 763. Actions for injuries by fires—Measure of damages. Where the action is for the destruction of a perennial crop the measure of damages is the difference in the market value of the real property immediately before and its value immediately after the infliction of the injury, and, when ascertaining this difference, evidence that another crop of same character and value may be grown on the land the same growing period, and of the average yield of like crops, of the average market price, the ordinary expense of harvesting and marketing such crops, the condition of that particular crop before the injury, and any other fact existing at the time of the loss tending to show how and what extent the injury decreased and diminished the value of the farm, may be considered. But evidence of matters occurring subsequently to the injury is not competent, overruling on this point *Lommelund v. Railway Co.*, 85 Minn. 412 (29 N. W. Rep. 119); *Ward v. Chicago, M. & St. P. Ry. Co.*, 61 Minn. 449 (63 N. W. Rep. 1104). The general rule laid down here was applied by the supreme court of Kansas to the destruction of an orchard. *Missouri Pac. Ry. Co. v. Haynes*, 1 Kan. App. 586 (42 Pac. Rep. 259). Where a building is destroyed the measure of damages is its value at the time of the destruction. *Atchison, T. & S. F. R. Co. v. Huitt*, 1 Kan. App. 788 (41 Pac. Rep. 1051). Where the only real damage to timber by fire from a railroad is the increased cost of cutting the same, it is error to consider the value of the timber in assessing damages. *Gordon v. G. R. & I. R. Co.*, Mich. (61 N. W. Rep. 549). In construing Colo. Gen. Stat., § 1036, making one liable for damages resulting from fire put out by him, it is held that exemplary damages are not allowable, and that attorney fees and compensation for voluntary services rendered by the party injured in putting out the fire are not recoverable. *Spencer v. Murphy*, Colo. App. (41 Pac. Rep. 841).

Sec. 764. Miscellaneous notes. A statute (Mich. Pub. Acts 1881, Act No. 183) requiring steamers using wood

for fuel to be provided with spark arresters, and making the vessel's owner liable for loss by fire occasioned by neglect to comply with the Act, is constitutional and applies to steamers engaged in interstate commerce although they are equipped with all the machinery and appliances required by the federal statutes and regulations. *Burrows v. Delta Transp. Co.*, Mich. (64 N. W. Rep. 501). S. Dak. Comp. Laws, § 2392, applied—action for damages against one setting out a fire—particular questions held to be questions for the jury. *Knight v. Towles*, S. Dak. (62 N. W. Rep. 964).

SPECIFIC PERFORMANCE.

EPILOGUE OF CASES.

Sec. 765. As to the right of—Equitable principles. Specific performance will not lie to enforce a contract which the parties by their conduct have treated as abandoned. *Giltner v. Rayl*, Ia. (61 N. W. Rep. 225). A vendor cannot enforce specific performance where the land is subject to an inchoate dower right of his wife. *McCreery v. Davis*, 44 S. C. 195 (22 S. E. Rep. 178; 51 Am. St. Rep. 794; 28 L. R. A. 655). Contracts without consideration will not be specifically enforced. *Bradford v. King*, 18 R. I. 743 (81 Atl. Rep. 166). Contracts against public policy will not be specifically enforced. *Kine v. Turner*, 27 Ore. 356 (41 Pac. Rep. 664). When a contract concerning real estate is valid, unobjectionable in its nature and in the circumstances connected with it, and capable of being enforced, and it is just and proper that it should be fulfilled, it is as much a matter of course for a court of equity to decree a specific performance as for a court of law to give damages for the breach of it. *Hoover v. Buck*, Va. (21 S. E. Rep. 474). Where the land is subject to a life maintenance in favor of a third party, that is no impediment to a specific performance of a contract of sale with general warranty, if the purchaser will accept a conveyance with such warranty, and rely upon it for

indemnity against such incumbrance. *Bates v. Swiger*, 40 W. Va. 420 (21 S. E. Rep. 874). The adequacy or inadequacy of damages as a remedy, is not determined with reference to the circumstances of a particular case, but the inquiry is whether such a case is one of a class where, any agreement generally of the kind involved, the terms or relations of the parties are such that the legal remedy of damages is adequate or inadequate, and, if the case falls within that class where specific performance will be decreed on the ground of part performance of the contract and the inadequacy of damages, specific performance will be decreed regardless of the amount of damages. *Payne v. Still*, 10 Wash. St. 433 (38 Pac. Rep. 994).

Sec. 766. Uncertainty of covenant to be performed. A covenant in a lease to deliver possession of part of a basement in a building to be erected, and to "reasonably" heat and light the demised premises during the term, may be specifically enforced after the completion of the building. *Jones v. Parker*, 163 Mass. 564 (40 N. E. Rep. 1044; 47 Am. St. Rep. 485). The court say: "It does not need argument to show that the covenant is valid. Whether it should be enforced specifically admits of more doubt, the question being whether it is certain enough for that purpose (Fry, Spec. Perf., §§ 380-386), and whether a decree for specific performance would not call on the court to do more than it is in the habit of undertaking. *Lucas v. Comerford*, 3 Brown, Ch. 166, 167; *Ross v. Railway Co.*, Woolw. 26, 43, Fed. Cas. No. 12,080. We are of the opinion that specific performance should be decreed. With the regard to the want of certainty of the covenant, if the plaintiff were left to an action at law a jury would have to determine whether what was done amounted to a reasonable heating and lighting. A judge sitting without a jury would find no difficulty in deciding the same question. We do not doubt that an expert would find it as easy to frame a scheme for doing the work. The other question is practical, rather than a matter of precedent. It fairly is to be supposed, in the present case, that the difference between the plaintiff and the defendants is only with regard to the necessity of some or more elaborate apparatus for light and heat—

a difference which lies within a narrow compass, and which can be adjusted by the court. There is no universal rule that courts of equity never will enforce a contract which requires some building to be done. They have enforced such contracts from the earliest days to the present time. Fry, Spec. Perf. (2d Ed.), §§ 88, 98, 102, 103; 2 Story, Eq. Jur., §§ 725, 728; Y. B. 8 Edw. IV pl. 11. *Twyford v. Wareup*, Finch, 310." The specific performance of a contract to convey an interest in land will not be enforced where the quantum of the interest agreed to be conveyed is wholly uncertain. *Berry v. Woodburn*, 107 Cal. 504 (40 Pac. Rep. 802).

Sec. 767. Mutuality of contract. A contract by one joint owner to sell the whole title to real estate owned by himself and others will not be specifically enforced on the ground of the want of mutuality. *Palmer v. Gould*, 144 N. Y. 671 (89 N. E. Rep. 878). Where, by the terms of an instrument under seal, signed by two parties, an obligation is imposed upon one of them to make a conveyance of land to the other upon the performance of conditions set forth in the instrument, even though there be no express undertaking upon the part of the latter to perform, the contract is nevertheless mutual, and the latter is bound to the performance of the covenants and conditions thereby impliedly imposed upon him. *Hamilton v. England*, 95 Ga. 698 (22 S. E. Rep. 697). When one party agrees to convey lands in consideration of services to be performed by the other, there is no lack of mutuality in the contract, after such services have been fully performed, as will necessarily defeat an action for specific performance of the contract. *Topeka W. Sup. Co. v. Root*, 56 Kan. 187 (42 Pac. Rep. 715). A contract under seal, to convey land to another upon the payment by him of a stipulated price, provided such payment be made within six months of the date of the contract, is obligatory, if supported by a consideration of five dollars actually paid by the obligee to the obligor. After the former has made his election to pay the stipulated price, and has actually tendered the same within the time specified in the contract, and demanded a conveyance, there is no want of mutuality, but both parties are bound absolutely, and specific performance may be enforced at the

instance of the obligee, suing in behalf of a third person, to whom he has sold all his interests in the premises, or in the contract sought to be enforced, such assignee being a coparty plaintiff, as usee. *Sims v. Lide*, 94 Ga. 558 (21 S. E. Rep. 220).

Sec. 768. Right of specific performance—Particular cases. Where a vendor, by executory contract, has conveyed the legal title to a subsequent purchaser for value, without notice, there cannot be specific performance of the executory contract in favor of the first purchaser; but, if the second purchaser had notice, there can be, the conveyance to him being void as to the first purchaser, and he can be compelled to convey the land, without warranty, to the first purchaser. *Bates v. Swiger*, 40 W. Va. 420 (21 S. E. Rep. 874). Where a general agent of a corporation, acting under parol authority, sold land belonging to the company, and yielded possession, without any condition or restriction as to its use, and the price was paid to the company in full by the purchaser, and improvements made by him, he is entitled to a specific performance of the contract as made, and to an unconditional deed from the company, although the agent who made the sale had no authority to make any deed or other conveyance. *Brunswick Co. v. Dart*, 98 Ga. 747 (20 S. E. Rep. 681). Where a vendor sells a tract of land to his vendee, and executes to such vendee a deed, in which his wife joins, but the certificate of acknowledgment is so defective in form as not to release a contingent dower of the wife, part of the purchase money having been paid in cash, and time having been given for the residue, specific performance of the contract will not be enforced by compelling the payment of the residue of the purchase money, unless such defendant is allowed to retain a sufficient amount of such purchase money to adequately indemnify him against such contingent right of dower. *Thorn v. Sprouse*, 89 W. Va. 706 (20 S. E. Rep. 676). Where, by a written contract, the owner of a tract of land stipulated to convey to the other contracting party a half interest in all the minerals that the latter might find, open and develop "to the extent that it will justify the employment of labor," with timber and water for mining purposes, the other

party stipulating in the writing to prospect the land within a specified time at his own expense, and the latter having complied with this stipulation, and discovered, opened and developed a mineral unknown by name, but of sufficient value to justify the employment of labor in mining the same, equity will, at his instance, compel the former to specifically execute his contract to convey in accordance with its terms. There was no want of mutuality in the terms of the contract as set forth in the writing, and the failure to sign the writing by the party who performed the undertaking is of no consequence, after full performance on his part. *Lindsay v. Warnock*, 93 Ga. 619 (21 S. E. Rep. 127). For cases which depend upon particular facts and illustrate the right to have specific performance, see, *Spraker v. Jenners*, 140 Ind. 688 (40 N. E. Rep. 117); *Sterrick v. McBride*, 157 Ill. 70 (41 N. E. Rep. 744); *Gannon v. Toole*, N. J. Eq. (32 Atl. Rep. 702); *Engle v. White*, 104 Mich. 15 (62 N. W. Rep. 154); *Easton, Eldridge & Co. v. Millington*, 105 Cal. 49 (38 Pac. Rep. 509); *Wooding v. Crain*, 10 Wash. St. 85 (38 Pac. Rep. 756); *Rust v. Strickland*, 21 Colo. 177 (40 Pac. Rep. 850); *Topcka W. Sup. Co. v. Root*, 56 Kan. 187 (42 Pac. Rep. 715); *Grubb v. Sharkey*, 90 Va. 831 (20 S. E. Rep. 784); *Farris v. Farris*, Ky. (29 S. W. Rep. 618).

Sec. 769. Parol agreements—When specifically enforced. Where a vendee of real estate upon delivering to the vendor certain securities which afterwards prove to be worthless, obtains possession of the premises and subsequently agrees to execute a valid mortgage upon other real estate in place of the worthless securities, such agreement will be specifically enforced by a court of equity notwithstanding that it rests wholly in parol. *Roberge v. Winne*, 144 N. Y. 709 (89 N. E. Rep. 681). Where a farmer, seventy years of age, residing on a farm about five miles from the city of Paterson, with an invalid wife and daughter, and another daughter, who was about to marry and leave home, proposed to his eldest son, who was engaged in business in Paterson, that if that son and his wife would take up their residence at the farm, and there make a home for the parents for the parents' lives, he would give the son the farm, under specified limitations, and the son

accepted the proposition, and thereafter, with his wife, moved to the farm, and, to the detriment of his business, and by the labor of his wife and himself, fully performed upon his part the agreement made by the proposition and its acceptance, it was held that, at the instance of the son, equity will compel the performance of the agreement upon the part of the father. It is essential to the validity of such an agreement that it shall be mutual, and, as well as, definite and certain, both as to its terms and subject-matter. Such an agreement must be clearly proven, and it must also be plainly established that the performance relied upon was referable to and consequent upon the agreement for the purpose of carrying it into effect. *Vreeland v. Vreeland*, 53 N. J. Eq. 387 (32 Atl. Rep. 8). See Statute of Frauds.

Sec. 770. Married women. In an action against a married woman to specifically enforce a contract to convey land where the husband has not signed the contract he cannot be compelled to join in the deed or to pay the costs. *Mix v. Baldwin*, 156 Ill. 313 (40 N. E. Rep. 959). In Maryland, a married woman's contract to convey land, executed jointly with her husband, may be specifically enforced. *Klecka v. Zeigler*, 81 Md. 482 (32 Atl. Rep. 241). The court say that "The trend of judicial decision in this country seems to be in the direction of placing liberal constructions" upon those statutes which enlarge the powers of married women. See *Ballards' Annual*, Vol. 8, § 695.

Sec. 771. Practice—Chancery powers of the court. As a general rule all persons interested in the subject matter of the suit or any object to be attained by it ought to be made parties either as complainants or defendants, but no one need be a party complainant in whom there exists no interest, and no one a party defendant from whom nothing is demanded. One who has parted with his title to property and against whom no relief is demanded need not be made a defendant in an action for specific performance. *Burrill v. Garst*, R. I. (81 Atl. Rep. 436). In a suit for specific performance of a contract for the sale of land, brought by vendee against vendor, it is no objection to relief that the contract calls for the conveyance of more land than the parties actually intended

to contract for, provided such extra land was not inserted for any fraudulent purpose, and the plaintiff is willing to accept relief as to that part of the land which is included in the contract in accordance with the understanding of the parties. So as to the contract price. If the price named is not as great as the parties actually agreed upon, the plaintiff may, in the absence of fraud, have conveyance upon paying the larger sum demanded by the defendant. A defendant vendor cannot set up as a defense to a suit for specific performance the delay of the vendee to bring suit where such delay has been due to the inability of the vendor to make title, and the vendee has been at all times ready and willing to complete, and the vendor has not repudiated nor attempted to rescind the contract. Where there has been an unexpected delay in the performance of the contract for which the vendee is not responsible, during which the land under contract has greatly increased in market value, such increase forms no defense to a suit by vendee for specific performance, unless it is due to some cause not in operation at the date of the contract, and not within the reasonable contemplation or expectation of the parties. Such increase in value may, however, be so great as, under certain circumstances, to induce the court to impose such equitable terms upon complainant, as to interest, taxes, etc., as to put the defendant in as good a condition pecuniarily as he would have been if there had been no delay. When, at the date of a contract to convey land, the same is subject to an adverse claim, and the vendor, honestly supposing it to be of trifling force, undertakes to convey a clear title, and litigation for that purpose occupies a much greater length of time, and is attended with much greater cost and expense than could have been reasonably contemplated, and in the meantime the land has greatly increased in value, such expense does not furnish a defense to an action by the vendee for specific performance if the vendee is willing to pay a proper portion of such cost and expense. On a bill for specific performance by vendee against vendor, if the vendor has aliened the land after the making of the contract, the complainant, if he shows himself entitled to relief, has his option either to have the proceeds of the sale, or to recover, if he can, the land itself in the

hands of the alienee. *Keim v. Lindley*, N. J. Eq. (80 Atl. Rep. 1068).

Sec. 772. Demand and tender—When necessary. In order that a vendor may have specific performance he must show that he has been ready and willing to fully perform his part of the contract. *Powell v. Perry*, 91 Va. 568 (22 S. E. Rep. 865). The same rule prevails where he seeks to enforce a vendor's lien. *Wood v. Walker*, 92 Va. 24 (22 S. E. Rep. 528). The right to have specific performance may be lost by failure of plaintiff to tender performance on his part, even though such failure has been occasioned by a dispute between the parties as to the terms of the contract. *Dokter v. Furch*, 91 Wis. 464 (65 N. W. Rep. 161). Where it is shown that a demand or tender would have been wholly unavailing it need not be made. *Shattuck v. Cunningham*, 166 Pa. St. 368 (81 Atl. Rep. 186). Where, by the terms of a contract for the sale and conveyance of land, the purchase price is made payable in installments, and the conveyance is to be made upon the payment of the last installment, and where default is made by the purchasers in the payments, and no action is brought by the vendors to enforce the contract until after the maturity of the last installment, the obligations of the parties to the contract are mutual and dependent, and the vendors cannot maintain an action to specifically enforce the contract or to recover any part of the purchase money until they make or tender a conveyance of the land. A petition filed by the vendors in an action to enforce such a contract which contains no averment of a tender of conveyance, and alleges no excuse for the failure to make such a tender, is fatally defective, and a demurrer thereto should be sustained. A judgment in such action which awards to the vendors the full purchase price of the land, without requiring them to convey the same to the purchasers by a good title, is erroneous, and the error is reversible in this court although no exception was taken to the same in the trial court. *Soper v. Gabe*, 55 Kan. 646 (41 Pac. Rep. 969). See Real actions—Demand and tender.

STATUTE OF FRAUDS.

EPITOME OF CASES.

Sec. 773. As to what contracts are within, and what not. Where two separate owners of real estate purchased by their separate funds, entered into copartnership with reference to a sale thereof by a parol contract, such contract is within the statute of frauds. *Goldstein v. Nathan*, 158 Ill. 641 (42 N. E. Rep. 72). Citing, *Vose v. Strong*, 144 Ill. 108 (38 N. E. Rep. 189); *Smith v. Burnham*, 3 Sumn. 435 (Fed. Cas. No. 18,019); *McCormick's Appeal*, 57 Pa. St. 54 (98 Am. Dec. 191). The court say: "A partnership may exist for the purpose of dealing in lands for profit, and the existence of such partnership and the extent of the interests of the respective partners may be shown by parol. *Speyer v. Desjardins*, 144 Ill. 641 (32 N. E. Rep. 288); *Traphagen v. Burt*, 67 N. Y. 80; *Chester v. Dickerson*, 54 N. Y. 1. * * * There is a wide distinction, however, between an agreement for one to become interested in the profits of certain land already purchased and owned by another, and an agreement to share in the benefits to be derived from lands to be thereafter acquired."

Under the South Dakota Statute, § 3545, of the Compiled Laws, which requires an agreement for the sale of real property or some memorandum or note thereof to be in writing and subscribed by the party to be charged, it is held that an agreement between two persons to jointly purchase certain lands and share equally in the profit or loss arising from a resale is in the nature of a special partnership and not within the statute of frauds. *Davenport v. Buchanan*, S. Dak. (61 N. W. Rep. 47). In Wisconsin it is held that an oral contract to form a partnership to purchase standing timber is in the nature of an agreement for a partnership in real estate and is void. *McMillen v. Pratt*, 89 Wis. 612 (62 N. W. Rep. 588). A verbal contract of an auctioneer at the time of conducting a sale of real estate is within the statute of frauds. *Boyd v. Greene*, 162 Mass. 556 (39 N. E.

Rep. 277). An agreement to give one a right of way over the land of another is within the statute of frauds. *Cole v. Hadley*, 162 Mass. 579 (39 N. E. Rep. 279).

Sec. 774. Sufficiency of memoranda. It is not necessary that a memorandum should contain all the parts of the contract or be formal. No matter how bungling it may be drawn, it will satisfy the statute of frauds if it contains all the essential terms of the contract either by its terms or by reference to other writings, so that it will not be necessary to resort to parol evidence to explain it. It must be definite in respect to the intention of the parties, who they are, their relations one to the other, who is the seller, who the buyer, the property, price and the terms of payments. *Harney v. Burhans*, 91 Wis. 848 (64 N. W. Rep. 1031). A promissory note given for the purchase price, reciting that it was in consideration for the land, naming the price to be paid therefor and signed by the purchaser, was sufficient. *Reynolds v. Kirk*, 105 Ala. 446 (17 So. Rep. 95). In order to maintain an action for the purchase price against a vendee who has been let into the possession, it is not necessary that he should have signed the memorandum of sale. *Moore v. Chenault*, Ky. (29 S. W. Rep. 140). It is sufficient if the memorandum be signed by the party sought to be charged therewith. *Peevey v. Haughton*, 72 Miss. 918 (17 So. Rep. 378; 18 So. Rep. 357; 48 Am. St. Rep. 592). Covenants relating to the management and sale of real estate, contained in a declaration of trust which was signed only by the trustee, cannot, in case of resulting trusts, be considered as covenants or limitations of their estates, on the part of other persons for whose benefit the trusts are declared. Nor does their acceptance of the declaration of trust, in such cases, dispense with the necessity of their signatures, under the statute of frauds, when the declaration is claimed to limit, or give an interest in, their equitable estates, which arose independently of the declaration of trust. *Adams v. Carey*, 53 N. J. Eq. 834 (31 Atl. Rep. 600). One who, as agent of the owner of real estate, engages an auctioneer to make a sale thereof at public outcry, cannot, as the auctioneer's clerk, make an entry or memorandum of the sale, so as to bind a bidder to whom the property was knocked off by

the auctioneer. *Howell v. Shewell*, 96 Ga. 454 (23 S. E. Rep. 810; 51 Am. St. Rep. 148). When, at a public sale, land is knocked down to the highest bidder by the auctioneer, he becomes the agent of both buyer and seller and the memoranda required by the statute of frauds is complete when he makes in his book an entry of the purchaser's name and the terms of the sale. *Pennsylvania R. Co. v. Nat. Docks & N. J. J. C. Ry. Co.*, N. J. L. (82 Atl. Rep. 220).

Sec. 775. Parol sales or leases. A parol contract for the transfer of an interest in land in consideration of legal services which have already been rendered was held valid. *Mitchell v. Colby*, Ia. (68 N. W. Rep. 769). In Tennessee it is held that a "parol sale is not void but only voidable at the election of either party; but where a deceased vendee who had paid part of the purchase price had manifested no desire to rescind during his life, his legal representative could not compel a rescission. *Phillips v. Kimmons*, 94 Tenn. 562 (29 S. W. Rep. 965). The court say: "We are of opinion that the option to rescind a parol contract for the sale and purchase of real estate does not extend to the administrator of the vendor or vendee in case of the death of the intestate of such administrator, and especially is this the case when the vendor and the heirs of the vendee do not desire a rescission, but prefer to consummate and complete it; and *a fortiori* is this so when the vendor is willing to look to the land alone for the unpaid purchase money, and waives any right to recover against the personal estate of the vendee, as in this case." A parol lease may be taken out of the statute of frauds by part performance. *Bless v. Jenkins*, 129 Mo. 647 (31 S. W. Rep. 938); *Eubank v. May & Thomas H. Co.*, 105 Ala. 629 (17 So. Rep. 109), applying Ala. Code, § 2121, subd. 5. In Michigan it is held by a divided court that where the lessee of a parol lease, the consideration therefor being the performance of certain work upon the premises, enters into the possession thereof and performs part of the labor he cannot defend an action brought to recover the land on account of his failure to complete the work, for the reason that the lease is void under the statutes of frauds. *Smelling v. Valley*, 103 Mich. 580 (61 N. W. Rep. 878).

Sec. 776. Repudiation of parol contract—Recovery of money paid. The vendee who repudiates a parol contract after having taken possession of the land which his vendor is ready and willing to convey, cannot recover purchase money which he has paid to the vendor under such contract. *Durham Consol. L. & Imp. Co. v. Guthrie*, 116 N. C. 381 (21 S. E. Rep. 952). The court say: "The statute only requires that the contract shall be in writing, and signed by 'the party to be charged therewith.' So if A. contracts in writing to sell a tract of land to B., whose promise to pay is not in writing, A. would be bound to perform, but B. would not, if he saw proper to avail himself of the statute. *Love v. Welch*, 97 N. C. 200 (2 S. E. Rep. 242). If A. and B. contract for the sale of land by parol, and the vendor elects to repudiate the contract, the vendee may recover back the amount he has paid under the contract. *Wilkie v. Womble*, 90 N. C. 254. A parol contract for land is not void, except at the instance of the party who is allowed to and does plead the statute, and neither party who repudiates the contract can take any advantage or benefit under it. The repudiator is left in the condition in which he finds himself at the time of the abandonment."

Sec. 777. Parol sale of equitable interest to one who holds the legal title. It is held that one holding the legal title to real estate, an equitable interest therein belonging to another, cannot acquire such equitable interest through a parol agreement. The court can perceive no distinction between the sale of land to which a man has only an equitable title and the sale of land to which he has a legal title; and an oral agreement for the transfer of an equitable interest in lands is as inoperative under the statute of frauds as one for the transfer of a legal title. *Tynan v. Warren*, 53 N. J. Eq. 313 (31 Atl. Rep. 596). Citing, *Hughes v. Moor*, 7 Cranch 176; *Darling v. Butler*, 45 Fed. 332; *Dougherty v. Catlett*, 129 Ill. 431 (21 N. E. Rep. 932); *Clitus v. Langford*, Tex. Civ. App. (24 S. W. Rep. 325); *Richards v. Richards*; 9 Gray 313; *Smith v. Burnham*, 3 Sumn. 435 (Fed. Cas. No. 17,424).

Sec. 778. Parol gifts. Equity protects a parol gift of land equally with a parol agreement to sell it, if accompanied by possession, and the donee, induced by the promise to give

it, has made valuable improvements on the property. *Dawson v. McFadden*, 22 Neb. 181 (84 N. W. Rep. 888). To establish such a case, it is not necessary that the proof should be beyond a doubt; a preponderance of the evidence is all that is required in any civil action. The circumstances which tend to cast suspicion upon such claims are circumstances to be considered in weighing the evidence to determine on which side the preponderance lies, but they do not create any rule of law as to the decree of proof. *Wylie v. Charlton*, 43 Neb. 840 (62 N. W. Rep. 220). For cases which depend upon particular facts and illustrate the validity of parol sales or gifts of land, see, *Howell v. Mellon*, 169 Pa. St. 188 (82 Atl. Rep. 450); *Lightner v. Lightner*, Va. (28 S. E. Rep. 801).

Sec.. 779. Part performance. In Kentucky it is held that a parol contract for the sale of an interest in land cannot be enforced, even though there be a part performance. *Barnes v. Beverly*, Ky. (82 S. W. Rep. 174). As to what will constitute such part performance as will take a case out of the statute of frauds depending upon particular facts of the case, see, *Young v. Overbauch*, 145 N. Y. 158 (89 N. E. Rep. 712); *Barnett v. Washington Glass Co.*, 12 Ind. App. 631 (40 N. E. Rep. 1102); *Morgan v. Battle*, 95 Ga. 663 (22 S. E. Rep. 689). Where the vendor and vendee are jointly in possession of the land and the vendor surrenders to the vendee the exclusive possession and receives the purchase price and the vendee subsequently makes valuable improvements, the case will be taken out of the operation of the statute of frauds. *Peck v. Stanfield*, 12 Wash. St. 101 (40 Pac. Rep. 635). In Michigan, under 2 How. Stat., §§ 6181 and 6183, it is held that while part performance of an oral contract may authorize a court of chancery to decree a specific performance, such part performance cannot be set up as a defense against the legal title to defeat a recovery of possession. *Bartlett v. Bartlett*, 103 Mich. 298 (61 N. W. Rep. 500). It is held that a payment of part of the purchase price and the payment of taxes and the listing of property with a real estate agent for sale is not sufficient part performance to take the case out of the statute of frauds. *Harney v. Burhans*, 91 Wis. 848 (64 N. W. Rep. 1031). A mere partial payment of the purchase

price is held not sufficient to take a parol agreement for the sale of land out of the operation of the statute of frauds. *Peters v. Dickinson*, N. H. (82 Atl. Rep. 154). A parol contract for the sale of a growing perennial crop is taken out of the statute of frauds by the purchaser's entry on the land with the owner's consent to harvest the crop. *Mowrey v. Davis*, 12 Ind. App. 681 (40 N. E. Rep. 1108). Where the part performance of a parol contract for the sale of land is relied upon, it must be shown affirmatively that the acts constituting such part performance were done in pursuance of the contract. *Waymire v. Waymire*, 141 Ind. 164 (40 N. E. Rep. 528).

Sec. 780. Miscellaneous notes. The consideration of a deed may be inquired into notwithstanding the statute of frauds. *Gardner v. Gardner*, Mich. (68 N. W. Rep. 988). A contract signed by an agent, beyond the scope of his authority, may be taken out of the statute of frauds by subsequent ratification by his principal. *Bless v. Jenkins*, 129 Mo. 647 (81 S. W. Rep. 988). Where the making of the contract is admitted the statute must be specially pleaded. *Bless v. Jenkins*, 129 Mo. 647 (81 S. W. Rep. 988). An agreement to devise land in consideration of services to be rendered, may be employed by the one rendering the services as the means of determining the amount of recovery on a *quantum meruit* against the estate, even when such contract is void under the statute of frauds. *In re Williams' estate*, Mich. (64 N. W. Rep. 490). The rule that a court of equity will enforce a trust created by parol in a suit brought for that purpose, where the answer to the bill alleging the trust admits the same but does not claim the benefit of the statute of frauds, will be applied although the answer is in no way signed by the defendant. *Tynan v. Warren*, 58 N. J. Eq. 313 (81 Atl. Rep. 596).

STATUTE OF LIMITATIONS.

EPITOME OF CASES.

Sec. 781. Time necessary to bar an action. Where the bill or complaint is so amended as to set up a new cause of action, the statute of limitations will be counted from the time of the filing of the amended complaint and not from the time of the filing of the original bill. *Hawley v. Simons*, 157 Ill. 218 (41 N. E. Rep. 616); *East Tenn. Iron & Coal Co. v. Brayles*, 95 Tenn. 612) 82 S. W. Rep. 761). Under Colo. Gen. Stat., §§ 2174 and 2180, it is held that an action to set aside an alleged fraudulent conveyance must be commenced within three years from the discovery of the fraud and if there has been a reversal of a judgment, a second action therefor must be commenced within one year from the date of the reversal and not from the date of the dismissal of the first action in the lower court. *Arnett v. Coffey*, 5 Colo. App. 560 (89 Pac. Rep. 894). Although Ill. Rev. Stat. 1898, Ch. 83, § 11, provides that "no person shall commence an action to foreclose any mortgage or deed of trust in the nature of a mortgage, unless within ten years after the right of action, or right to make such a sale accrues," it is held that a suit to foreclose a mortgage is not barred, even after the lapse of ten years, so long as the right of action on the mortgage debt is not barred. *Hibernian Banking Ass'n v. Commercial Natl. Bank*, 157 Ill. 576 (41 N. E. Rep. 919). Under Ind. Rev. Stat. 1894, § 294, subd. 4, an action to set aside an administrator's sale for the reason that it was made to himself, must be brought within five years from the confirmation of such sale. *Axton v. Carter*, 141 Ind. 672 (39 N. E. Rep. 546). Under Ia. Code, § 2529, an action for breach of warranty against incumbrances may be begun any time within ten years after the execution and delivery of the deed.

Yancey v. Tatlock, Ia. (61 N. W. Rep. 997). As against an action by creditors to set aside a conveyance on the ground of fraud, the statute of limitations is held to begin to run from the filing of such deed for record, and under the Iowa Code, § 2529, such action must be brought within five years after the fraud has been discovered. *Sims v. Gray*, Ia.

(61 N. W. Rep. 171). In Nebraska, an action by a subsequent mortgagee to enforce his equities as against the mortgagor and purchaser through a decree foreclosing the prior mortgage, to which he was not made a party, may be brought at any time within ten years after the cause of action accrued. *Baldwin v. Burt*, 43 Neb. 245 (61 N. W. Rep. 601). In South Carolina an action by a grantor to set aside a deed on account of having been obtained by fraud is barred in six years after the discovery of the fraud. *Brown v. Brown*, 44 S. C. 878 (22 S. E. Rep. 412). In Virginia it is held that there is no limitation by statute upon a creditor's right to attack a deed as fraudulent in fact. *Bumgardner v. Harris*, 92 Va. 188 (28 S. E. Rep. 229). Wash. Code Proc., § 115, subd. 4, providing that actions for relief on the ground of fraud must be brought within three years from the discovery of the fraud applies to an action to recover real property conveyed by a deed obtained through fraud. *Morgan v. Morgan*, 10 Wash. St. 99 (38 Pac. Rep. 1054). See opinion for extensive discussion of this subject. See Vol. 1, § 614; Vol. 2, § 671; Vol. 3, § 709.

Sec. 782. As to when the statute begins to run. The statute of limitations begins to run when the damage is sustained by the complaining party, not when the causes are first set in motion which ultimately produce the injury. *Henry v. Ohio R. R. Co.*, 40 W. Va. 234 (21 S. E. Rep. 863). The statute does not begin to run in favor of the grantee in a deed executed as a mortgage, as against the right of the grantor to pay his debt and demand a reconveyance, so long as he treats the deed as a mortgage to secure the debt, upon which he applies the rents and profits of the premises. *Dunton v. McCook*, Ia. (61 N. W. Rep. 977). The statute begins to run against one who has assumed the payment of a mortgage from the time the agreement to assume is made, and its

running is not suspended by the absence of the mortgagor from the state. *Robertson v. Stuhlmiller*, Ia. (61 N. W. Rep. 986). As to when the pendency of a suit will prevent the statute from beginning to run, illustrated by case depending upon particular facts. *Nelson v. Ratliff*, 72 Miss 656 (18 So. Rep. 487).

Sec. 783. As to when it begins to run—Husband and wife—Trusts and trustees. Where the husband has a right to the possession of his wife's separate real estate, the statute of limitations will begin to run against him from the accrual of this right, although the land is not subject to his debts, cannot be conveyed except upon joinder by the wife, and she is disqualified to sue alone. *Arnold v. Willis*, 128 Mo. 145 (30 S. W. Rep. 517). Citing, *Peck v. Lockridge*, 97 Mo. 549 (11 S. W. Rep. 246); *Kibbie v. Williams*, 58 Ill. 80; Schouler, *Husb. & W.*, § 168; *Thompson v. Green*, 4 Ohio St. 216; *Weisinger v. Murphy*, 2 Head 674; *Shortall v. Hickley*, 31 Ill. 219. Where the trustee disavows his trust, and assumes complete ownership of the trust property, and treats it in such a manner and under circumstances as to give the *cestui que trust* actual or constructive notice that he has repudiated all trust relations, the statute attaches and begins to run, as against the *cestui que trust* from that time, unless he is then under some statutory disability or under influences superinduced by the trustee. Such denial of the trust relations and the assertion of an adverse or hostile claim by the trustee is an abandonment of the fiduciary character in which he theretofore stood as to the property; and from the time that it is made to appear clearly that the *cestui que trust* had knowledge, either directly or indirectly by necessary implication, of the repudiation or adverse and hostile claim of the trustee, the statute begins to run, and if it continues for the statutory period the *cestui que trust* is barred. *Raymond v. Flaval*, 27 Ore. 219 (40 Pac. Rep. 158).

Sec. 784. As to when the statute begins to run—Subterranean trespass. It is held that where one land owner by means of subterranean passages removes coal from under the adjoining land whose owner is without means of knowing of the trespass, the statute of limitations does not

begin to run against the injured party until he either discovers the trespass or until the discovery is reasonably possible. *Lewey v. H. C. Frick Coke Co.*, 166 Pa. St. 536 (31 Atl. Rep. 261; 45 Am. St. Rep. 684). The court say: "In the English courts this question has arisen quite frequently. The old rule applied in the courts of law was that the statute might be successfully pleaded as running from the date of the trespass. In the courts of equity, where an account for the coal that had been taken was asked for, it was applied only from the discovery of the trespass. *McSwinnny, Mines*, 543. See, also, *Hovenden v. Lord Annesley*, 2 Schoales & L. 634. If, after discovery, or the happening of any circumstance calculated to put the owner on notice, he slept on his rights till the statutory period had expired, he was held bound by the statute in equity precisely as he would have been at law. If he knew, or if by the exercise of reasonable care he might have known, of the trespass, the statute ran from the discovery, or the time when discovery could have been made. *Bainb. Mines*, 515, 516. It was against good conscience to permit one who had taken the property of another without the owner's knowledge, and who had failed to disclose or account for what he had taken, to avail himself of the statute while the owner remained in ignorance of his loss. When compensation was sought by means of a bill for an account, it was held that the statute began to run at the time of discovery, regardless of the time of taking. The same question was also encountered in actions to recover for injuries done on the surface by subsidence due to the withdrawal of support. When the action was trespass, it was generally held that the statute ran from the date of the removal of the support, which was the trespass to which the injury was due; but, when the action was case, the subsidence was treated as the consequence of the wrongful removal of the coal or other underlying stratum, and the damages suffered as consequential. The happening of the injury was upon this ground held to give a cause of action, against which the statute would run only from its date. The removal of the supports might not be known to, or be discovered by, the owner of the surface until the subsidence revealed it; and, unless the injury consequential to the trespass could be treated as creating a cause of action, in most cases redress for a substantial injury would be denied

altogether. *Backhouse v. Bonomi*, 34 Law J. Q. B. 181, 9 H. L. Cas. 508; *Smith v. Thackerah*, 14 Am. Law Reg. (Vol. 5, N. S.) 761, and note. The reason for the distinction exists in the nature of things. The owner of the land may be present by himself or his servants on the surface of his possessions, no matter how extensive they may be. He is for this reason held to be constructively present wherever his title extends. He cannot be present in the interior of the earth. No amount of vigilance will enable him to detect the approach of trespasser who may be working his way through the coal seams underlying adjoining lands. His senses cannot inform him of the encroachment by such trespasser upon the coal that is hidden in the rocks under his feet. He cannot reasonably be held to be constructively present where his presence is, in the nature of things, impossible. He must learn of such a trespass by other means than such as are within his own control, and, until these come within his reach, he is necessarily ignorant of his loss. He cannot reasonably be required to act until knowledge that action is needed is possible to him. We are disposed to hold, therefore, that the statute runs against an injury committed in or to a lower stratum from the time of actual discovery, or the time when discovery was reasonably possible. But it is enough for the purposes of this case to hold that, inasmuch as equity is administered in this state through the common-law forms of action, the plaintiff need not be turned out of a court of law in order to be admitted at the equity side of the same court. He may not be entitled to statutory damages, but he is entitled to compensation in the same manner that he would have been on a bill for an account. For this purpose, the equitable rule that the statute shall run only from discovery, or a time when discovery might have been made, should be applied by courts of law."

Sec. 785. Laches—Equitable principles—Particular cases. Where a party has slept upon his rights or acquiesced for a great length of time a court of equity will refuse relief. *Brown v. Brown*, 154 Ill. 85 (39 N. E. Rep. 983); *McLaffin v. Jones*, 155 Ill. 539 (40 N. E. Rep. 830); *Happ v. Happ*, 156 Ill. 183 (41 N. E. Rep. 39); *Whidden v. Whidden*, N. H. (32 Atl. Rep. 152); *Welch v.*

Cornett, Ky. (29 S. W. Rep. 812). In order to call into activity a court of equity, there must be an exercise of good conscience, good faith and reasonable diligence; and where time and long acquiescence have obscured the nature and character of the trust, or the acts of the parties or other circumstances give rise to presumptions unfavorable to its continuance, the court is passive, and does nothing, because of its inability to do complete justice. *Raymond v. Flavel*, 27 Ore. 219 (40 Pac. Rep. 158). Whether or not a demand is stale is a question of law. *Raymond v. Flavel*, 27 Ore. 219 (40 Pac. Rep. 158). Parties who come into courts of equity with stale claims postponed for a long lapse of time until the death of the party sought to be charged will be held to the strictest proof of the establishment of their asserted rights. *Groome v. Belt*, 171 Pa. St. 74 (32 Atl. Rep. 1132). A judgment creditor who delays twenty years after obtaining his judgment and after knowledge of the alleged fraud, in filing his bill to set aside a conveyance made by the debtor to his wife on the ground of fraud, is guilty of laches. *Frenche v. Kitchen*, 53 N. J. Eq. 87 (30 Atl. Rep. 815). The laches that will bar a recovery in a particular case depend, to a large extent, upon the character and the nature of the circumstances surrounding the transaction. Where the subject-matter of the litigation is unpatented mining property, purely speculative in value, the necessity for prompt assertion of title has always been recognized by the English and American courts. *Brown v. Wilson*, 21 Colo. 809 (40 Pac. Rep. 688). For cases which depend upon particular facts and illustrate the doctrine of laches, see *Richardson v. Medbury*, Mich. (65 N. W. Rep. 4); *Bonner v. Bynum*, 72 Miss. 442 (18 So. Rep. 82); *Burr v. Kase*, 168 Pa. St. 81 (31 Atl. Rep. 954).

Sec. 786. Laches—Pleading. It is held that no plea is essential to the defense of laches and that the mere institution of a suit does not, of itself, relieve a person from the charge of laches, and that if he fail in the diligent prosecution of the action the consequences are the same as though no action had begun. *Hagerman v. Bates*, 5 Col. App. 391 (38 Pac. Rep. 1100). In Illinois it is held that a defendant in order to avail himself of the defense of laches must set up such

defense by plea or answer so as to afford complainant opportunity to amend the bill by inserting allegations accounting for the delay. *Coryell v. Klehm*, 157 Ill. 462 (41 N. E. Rep. 864); *Hibernian Banking Ass'n v. Commercial Nat. Bk.*, 157 Ill. 576 (41 N. E. Rep. 919).

Sec. 787. Laches—Excuses for. Reliance upon an apparently valid judgment which is subsequently set aside may be an excuse for laches. *Bumgardner v. Harris*, 92 Va. 188 (28 S. E. Rep. 229). Lapse of time, as an equitable bar, only raises a presumption, which may be rebutted. "Courts will not enforce a resulting trust after a great lapse of time, or laches on the part of the supposed *cestui que trust*, especially when it appears that the supposed nominal purchaser has occupied and enjoyed the estate. But if the trust is admitted, and there has been no adverse holding, lapse of time is no bar, and laches will not be allowed to avail as a defense, where fraud has been practiced on the *cestui*, to keep her in ignorance of her rights until just before filing the bill. Any excuse for delay that takes hold of the conscience of the chancellor, and makes it inequitable to interpose the bar, is sufficient." *Berry v. Wiedman*, 40 W. Va. 86 (20 S. E. Rep. 817). It is held that a delay of nearly four months after the last installment of purchase money became due of a vendor before tendering a deed to the vendee is not such laches as will estop him from asking a specific performance, there being no circumstances by which the vendee has been misled to his prejudice. *Wooding v. Crain*, 10 Wash. St. 85 (88 Pac. Rep. 756). The rule that laches in bringing suit will deprive one of his remedy is not applied unless such neglect has so prejudiced the other party by loss of testimony, or means of proof, or changed relations that it would be unjust to now permit him to enforce his rights. *Tynan v. Warren*, 58 N. J. Eq. 818 (31 Atl Rep. 596).

Sec. 788. Disabilities and exceptions. Where the statute of limitations is relied upon and the other party seeks to avail himself of an exception, he has the burden of pleading and proving the facts which bring him within the exception. *Gross v. Disney*, 95 Tenn. 592 (32 S. W. Rep. 632). A statutory provision removing all legal disability of married

women, does not affect the statute of limitations giving a married woman fifteen years instead of ten years in which to sue for the possession of land. *Lattie-Morrison v. Holladay*, 27 Ore. 175 (39 Pac. Rep. 1100). It is held that ordinary laches will not be imputed to infants, but where they claim under an ancestor who is presumed to be dead from seven years absence, his neglect to assert his rights for a long time, including the seven years' absence from which his death is presumed, may bar their right of action in a court of equity. *Reedy v. Millixen*, 155 Ill. 686 (40 N. E. Rep. 1028). Under Miss. Code 1880, § 2694, the statute of limitations runs against the *cestuis que trustent*, though they may be under disabilities, during the time the legal title is in the trustee. *Gulf Coast Canning Co. v. Foster*, Miss. (17 So. Rep. 688). Where a husband pays a mortgage on his wife's land given to secure his bond for unpaid purchase-money, and is entitled to be subrogated to the rights of the mortgagee, the fact that the husband can sue the wife only in equity does not constitute a sufficient reason for refusing to apply to such cause of action the statute of limitations. *Bennett v. Finnegan*, N. J. Eq. (33 Atl. Rep. 401).

Sec. 789. Cases to which the statute does not apply. The statute of limitations does not run against a trust arising from the purchase of land by a guardian with his ward's money. *Thompson v. Hartline*, 105 Ala. 263 (16 So. Rep. 711). Where the Paola Town Company filed in the proper office of register of deeds its map or plat of the city of Paola on April 17, 1861, with a square thereon designated as "Seminary Square," and the town company and its agents sold and conveyed lots from its plat, until all its lots were sold and the town site had become a city, and from the time of the filing of the town plat up to the time the town company went out of existence it never exercised any control over "Seminary Square," but always treated it as public ground, and after the company ceased to exist as a corporation, and up to the time when all of its affairs were settled by its general manager, the "Square" was never considered as a part of the assets of the corporation, but always treated as public ground to be used for "seminary purposes." and from April 17, 1861, to Novem-

ber 27, 1882, it was never assessed or taxed, it was held that the mere fact that the "Square" was vacant and unoccupied for more than 25 years, awaiting the time when the necessities of the public demanded it for seminary or school purposes, will not prevent "the board of education of the city of Paola," from taking possession thereof, and using it for school purposes, on account of any supposed bar of the statute of limitations. *Wilgus v. Board of Comm'rs*, 54 Kan. 605 (38 Pac. Rep. 787). Rev. St. U. S., § 5057, which bars after two years all suits "between an assignee in bankruptcy and a person claiming an adverse interest touching any property or rights of property transferable to or vested in such assignee," has no application to a suit to enforce a trust as against a grantee of such an assignee, where it appears that the bankrupt always recognized the trust; that the land subject to it was not scheduled among his effects; that the assignee, when applying to the court for leave to sell the land, described the title vested in him as a cloud on the title of a large number of owners of different parts of the land, who had applied to him to sell; and that the deed given by the assignee conveyed the land "subject to all liens and incumbrances," since the interest of the assignee never became adverse to the *cestui que trust*. *Coryell v. Klehm*, 157 Ill. 462 (41 N. E. Rep. 864).

Sec. 790. Arrest or suspension of the statute. In a recent well considered case it is held, that a payment on a mortgage made by the heirs of the mortgagor, who have inherited part of the mortgaged premises, for the protection of their title, does not arrest the running of the statute as against the lien of the mortgage on a portion of the land which the mortgagor in his life time conveyed to a third person for full value who assumed no duty and who was under no obligation to pay the mortgage debt. *Murdock v. Waterman*, 145 N. Y. 55 (39 N. E. Rep. 829; 27 L. R. A. 418). An acknowledgment by a mortgagor of his indebtedness to the mortgagee made to a third person with directions to convey the same to the mortgagee, is such an acknowledgment as to prevent the operation of the statute of limitations. *Miller v. Teeter*, 53 N. J. Eq. 262 (31 Atl. Rep. 394). As to when absence from the state will suspend the statute. *Craig's Ex'r v. Anderson*, 96 Ky. 425

(29 S. W. Rep. 811) ; *Huff v. Crawford*, 88 Tex. 368 (30 S. W. 546). After an adverse possession sufficient to set the statute of limitations to running has commenced, the acceptance by the disseisor of a conveyance from a party claiming some interest in the land does not arrest the statute of limitations nor work an abandonment of rights acquired by such adverse possession. Where the statute begins to run against a married woman it is not arrested by her death but continues to run against her heirs even though they be minors, and though their estate is postponed to a life estate. "The general rule is that when the statute of limitations begins to run it will continue to run until it operates as a complete bar unless there is some saving qualification in the statute itself." *Beattie v. Whipple*, 154 Ill. 278 (40 N. E. Rep. 840).

SURFACE WATER.

EPITOME OF CASES.

Sec. 791. As to what is surface water. The term "surface water" includes such as is carried off by surface drainage—that is, by drainage independently of a water course; and for the construction of an embankment proper for railroad purposes, which deflects such surface water from its normal course, a railroad company is not liable in damages to the proprietor, or lessee of neighboring lands, thereby incidentally overflowed and injured. *Bunderson v. Burlington & M. R. R. Co.*, 48 Neb. 545 (61 N. W. Rep. 721). Where a water course overflows its banks the escaping waters which are not confined to any particular or permanent way are surface waters and for their diversion or obstruction there can be no recovery of damages. *New York C. & St. L. R. Co. v. Speelman*, 12 Ind. App. 372 (40 N. E. Rep. 541) ; *Missouri Pac. Ry. Co. v. Keys*, 55 Kan. 205 (40 Pac. Rep. 275 ; 49 Am. St. Rep. 249).

Sec. 792. Upper and lower estates—Servitude of the latter—Rule in some of the states. In a recent case the

supreme court of Alabama say: "Whatever may be the diversity of opinion and decision elsewhere, in this state it is the settled doctrine that where two parcels of land, belonging to different owners, lie adjacent to each other, and one parcel lies lower than the other, the lower one owes a servitude to the upper, to receive the water which naturally runs from it, provided the industry of man has not been used to create the servitude; or in other words, the owner of the upper parcel of land has a natural easement in the lower parcel, to the extent of the natural flow of water from the upper parcel to and upon the lower. The distinction elsewhere observed as to the waters of a running stream, having a channel more or less defined, and the flowage of surface water—water spread over the surface of the earth in consequence of rains or snows, or forming in the surface beneath the earth—has not prevailed here. The wrong intended to be guarded against is the diversion of water, causing it to flow upon the lands of another, without his will, which did not naturally flow there; and it is not deemed material whether the water is diverted from a running stream, or is surface water caused to flow where it did not flow before." *Savannah, A. & M. Ry. v. Buford*, 106 Ala. 303 (17 So. Rep. 395). A railroad company has no more right to obstruct the natural flow of water by an embankment, or other artificial means, or by the collection by it into an artificial channel, forcing or conducting it to a discharge upon the lands of another, than it has, in the same way, to dispose of water from water courses, and it is as liable for the resulting damage in the one case as in the other. *Savannah, A. & M. Ry. v. Buford*, 106 Ala. 303 (17 So. Rep. 395). Citing, *Waterman v. Railroad Co.*, 30 Vt. 610 (78 Am. Dec. 326); *Railroad Co. v. Morrison*, 71 Ill. 616; *Railroad Co. v. Cox*, 91 Ill. 500; *Railroad Co. v. Hays*, 11 Lea 382 (47 Am. Rep. 291); *Railroad Co. v. Davis*, 68 Md. 281 (6 Am. St. Rep. 440; 11 Atl. Rep. 822); *Railroad Co. v. Anderson*, 79 Tex. 427 (23 Am. St. Rep. 350; 15 S. W. Rep. 484); *Railway Co. v. Mossman*, 90 Tenn. 157 (25 Am. St. Rep. 670; 16 S. W. Rep. 64).

Sec. 793. Fighting surface water—The common law rule. The common law rule prevails in Nebraska where it

is held that surface water is a common enemy; and that an owner may defend his premises against it by dike or embankment, and, if damages result to adjoining proprietors by reason of such defense, he is not liable therefor. But this rule is a general one, and subject to another common-law rule, that a proprietor must so use his own property as not to unnecessarily and negligently injure his neighbor. Therefore every proprietor may lawfully improve his property by doing what is reasonably necessary for that purpose, and, unless guilty of some act of negligence in the manner of its execution, will not be answerable to an adjoining proprietor, although he may thereby cause the surface water to flow on the premises of the latter to his damage. But if in the execution of such enterprise he is guilty of negligence, which is the natural and proximate cause of injury to his neighbor, he is accountable therefor. *Lincoln & B. H. R. Co. v. Sutherland*, 44 Neb. 526 (62 N. W. Rep. 859); *City of Beatrice v. Leary*, 45 Neb. 149 (68 N. W. Rep. 870; 50 Am. St. Rep. 546). Waters which have overflowed the banks of a stream during a freshet, in consequence of the insufficiency of the channel to hold and carry them off, are surface waters, to be treated as a common enemy, against which any landowner affected may protect himself. While a landowner cannot obstruct a water course, or divert a stream of water so as to cause injury to another without being responsible therefor, he has the right to obstruct and hinder the flow of mere surface water upon his land from the land of other proprietors—and he can even obstruct and turn the same back upon the land of his neighbor, without incurring liability for injuries caused by such obstruction. *Missouri Pac. Ry. Co. v. Keys*, 55 Kan. 205 (40 Pac. Rep. 275; 49 Am. St. Rep. 249).

Sec. 794. Common law rule as modified. In Minnesota it is held that the old common law rule that surface water is a common enemy, which each owner may get rid of as best he can, is in force except that it is modified by the rule that he must so use his own as not unnecessarily or unreasonably to injure his neighbor. Under this rule it is the duty of an owner draining his own land to deposit the surface water in some natural drain, if one is reasonably accessible; and he is

entitled to deposit the same in such natural drain, though it is thereby conveyed upon the land of his neighbor, if it does not thereby unreasonably injure him. A circumstance to be considered in determining what is a reasonable use of one's own land, under this rule, is the amount of benefit to his estate thus drained, as compared with the amount of injury to his neighbor's estate by reason of casting the burden of the surface water upon it. Subject to these limitations and the rule that he must in all cases do what is reasonable to dispose of the surface water to the least injury to his neighbors, such owner has a right to drain his own land for some proper use, and cast the water upon theirs, whether such drainage is the direct and sole purpose of the improvement, or only results incidentally therefrom. *Sheehan v. Flynn*, 59 Minn. 486 (61 N. W. Rep. 462; 26 L. R. A. 682). Criticising, *Hogenson v. Railway Co.*, 81 Minn. 224 (17 N. W. Rep. 874); *Olson v. Railway Co.*, 88 Minn. 419 (87 N. W. Rep. 953); *Jordan v. Railway Co.*, 42 Minn. 172 (48 N. W. Rep. 849). Disapproving, *Rowe v. Railway Co.*, 41 Minn. 884 (48 N. W. Rep. 76). A party has no right to gather up surface water, and discharge it on the land of another, to his damage. Subject to this limitation he has the right to drain and dispose of such water as he sees fit. *Bunderson v. Burlington & M. R. R. Co.*, 48 Neb. 545 (61 N. W. Rep. 721). Following, *Railroad Co. v. Marley*, 25 Neb. 188 (40 N. W. Rep. 948). The general rule is that within the boundaries of his own land not interfering with any natural or prescriptive water course, the owner may erect such barriers as he may deem necessary to keep off surface water. If in an action by the upper owner to prevent such obstruction of surface water his claim rests upon any granted or prescriptive right he must so aver in his complaint. *Lake Erie & W. R. Co. v. Hilfiker*, 12 Ind. App. 280 (40 N. E. Rep. 80). Where the upper riparian owner causes the flowage in a stream to contain a sediment which accumulates into the bed of the stream upon the lower owner and thereby causes an overflowage to his injury, he will be liable for damages. *Hindson v. Markle*, 171 Pa. St. 188 (33 Atl. Rep. 74). Where water from a spring flowed in a channel to a point where it was spread over low ground, and thence, from time immemorial, flowed again in a definite

channel at certain seasons of the year, onto defendant's land, and formed pools there, defendant has no right, by erecting an embankment on his land, to prevent the flow of said waters, and cause the same to be thrown back on plaintiff's roadway. *Mitchell v. Bain*, 142 Ind. 604 (42 N. E. Rep. 280). It is held that where the upper landowner increases the quantity and changes the character of the water so that it becomes more injurious to the lower owner he is liable for such injuries unless he could not prevent the injury by reasonable care and expenditure. *Pfeiffer v. Brown*, 165 Pa. St. 267 (80 Atl. Rep. 844). The court say: "The right of the upper landowner to discharge water on the lower lands of his neighbor is, in general, a right of flowage only, in the natural ways and natural quantities. If he alters the natural conditions so as to change the course of the water, or concentrate it at a particular point, or by artificial means to increase its volume, he becomes liable for the injury caused thereby." This doctrine is supported by *Stinson v. Fishel*, Ia. (61 N. W. Rep. 1068); *Kansas City, M. & B. R. Co. v. Lackey*, 72 Miss. 881 (16 So. Rep. 909).

Sec. 795. Right to fight surface water as a common enemy—Exceptions to the rule. In *Norfolk & W. R. Co. v. Carter*, 91 Va. 587 (22 S. E. Rep. 517), a recent and well considered case, the supreme court of Virginia say: "Upon the relative rights of adjacent land owners with respect to surface water there is a contrariety of judicial decision. Except where the civil-law doctrine of the servitude of the lower tenement prevails, the general rule is, however, that no action will lie for obstructing the flow of surface water. Where the common law is in force, as in this state, surface water is considered a common enemy, and the courts agree that each landowner may fight it off as best he may. He may obstruct or hinder its flow, and may even turn it back upon the land of his neighbor, whence it came. This results from the dominion the law gives to him over his land. His right to it extends beneath the surface to the center of the earth, and above it to the skies. He is entitled to the free and unfettered control of it above, upon, and beneath the surface, and cannot be held liable for any injury which its reasonable use

and enjoyment may cause to other lands in interrupting the flow of water. He may change the surface of his own land, or erect buildings or other structures upon it, and thus restrain or divert the surface water which may accumulate on adjacent lands from falling rains and melting snows, without being made liable therefor to their owners. Gould, Waters, § 273; Angell, Water Courses, §§ 108a, 108b; *Gannett v. Hargadon*, 10 Allen 106 (87 Am. Dec. 625); *Taylor v. Fickas*, 64 Ind. 167 (31 Am. Rep. 114); *Sweet v. Cutts*, 50 N. H. 439 (9 Am. Rep. 276); *O' Connor v. Railroad Co.*, 52 Wis. 526 (9 N. W. Rep. 287; 38 Am. Rep. 754); and Washb. Easem. (3d Ed.) § 353 (3a). And this right is possessed by a railroad company in respect to its right of way as well as by any other owner of real estate. It enjoys the same privileges as any other owner of land; no greater, but no less. Gould, Waters, § 273; *Jenkins v. Railroad Co.*, 110 N. C. 438 (15 S. E. Rep. 193); *Rowe v. Railroad Co.*, 41 Minn. 384 (43 N. W. Rep. 76; 16 Am. St. Rep. 706); *Sullens v. Railroad Co.*, 74 Ia. 659 (38 N. W. Rep. 545; 7 Am. St. Rep. 501); *O' Connor v. Railroad Co.*, 52 Wis. 526 (9 N. W. Rep. 287; 38 Am. Rep. 754); *Railroad Co. v. Stevens*, 38 Am. Rep. 139; and *Railroad Co. v. Hammer*, 31 Am. Rep. 216. This right in regard to surface water may not be exercised wantonly, unnecessarily, or carelessly; but is modified by that golden maxim of the law, that one must so use his own property as not to injure the rights of another. It must be a reasonable use of the land for its improvement or better enjoyment, and the right must be exercised in good faith, with no purpose to abridge or interfere with the rights of others, and with such care with respect to the property that may be affected by the use or improvement as not to inflict any injury beyond what is necessary. Where the exercise of the rights is thus guarded, although injury may result to the land of another, he is without remedy. Lewis, Em. Dom., § 585; Washb. Easem. (3d Ed.) p. 455; *Sweet v. Cutts*, 50 N. H. 439 (9 Am. Rep. 276); *Railroad Co. v. Wicker*, 74 N. C. 220; *Beard v. Murphy*, 37 Vt. 99 (86 Am. Dec. 693); *Railroad Co. v. Chapman*, 43 Am. Rep. 280; *Abbott v. Railroad Co.*, 53 Am. Rep. 581; *Taylor v. Fickas*, 31 Am. Rep. 114; *Railroad Co. v. Hammer*, 31 Am. Rep. 216; and 24 Am. & Eng. Enc. Law,

920. The right, thus modified, has also its exceptions. One exception is that the owner of the land cannot collect the water into an artificial channel or volume and pour it upon the land of another, to his injury. The right to fend off surface water does not extend that far. *Davis v. City of Crawfordsville*, 119 Ind. 1 (21 N. E. Rep. 449); *City of Evansville v. Decker*, 48 Am. Rep. 86; *Railroad Co. v. Stevens*, 88 Am. Rep. 139; *Patoka Tp. v. Hopkins*, 181 Ind. 142 (80 N. E. Rep. 896; 31 Am. St. Rep. 417); *Rychlicki v. City of St. Louis*, 98 Mo. 497 (11 S. W. Rep. 1001; 14 Am. St. Rep. 651); *Railroad Co. v. Marley*, 25 Neb. 188 (40 N. W. Rep. 948; 18 Am. St. Rep. 482); *Chalkley v. City of Richmond*, 88 Va. 402 (14 S. E. Rep. 389; 29 Am. St. Rep. 780); 2 Dill. Mun. Corp., § 1051; and Gould, Waters, § 271. Another exception to the right, which pertinently applies to this case, is that the owner of the land cannot interfere with the flow of surface water in a natural channel or water course. Where the water has been accustomed to gather and flow along a well defined channel, which by frequently running it has worn or cut into the soil, he may not obstruct or divert it to the injury of another. *Earl v. De Hart*, 12 N. J. Eq. 280; *Railroad Co. v. Chapman*, 48 Am. Rep. 280; *Gibbs v. Williams*, 87 Am. Rep. 241; *Palmer v. Waddell*, 22 Kan. 355; *Rowe v. Railroad Co.*, 41 Minn. 384 (16 Am. St. Rep. 706; 48 N. W. Rep. 76); and 24 Am. & Eng. Enc. Law, 900-902."

Sec. 796. Liability of municipalities. In Nebraska it is held that a city may be liable for damages to property owners resulting from an overflow of surface water caused by defective sewers and drains negligently constructed by such city. *City of Beatrice v. Leary*, 45 Neb. 149 (68 N. W. Rep. 370; 50 Am. St. Rep. 546). The court say: "The third argument is that the judgment is contrary to law, because the city adopted a plan for carrying the waters of this draw into the Blue river by building dikes, as already stated, across the draw at Scott and Mary streets, and constructing ditches along said streets from the draw to the river; that the city in adopting this plan was exercising legislative functions; and that the city is not liable for any damages that have resulted, although the plan adopted was defective, as it is not liable in

the absence of bad faith, for a mere error of judgment. The authorities on this question are in hopeless conflict. On the one hand, it is held that the adoption of a plan of drainage by a city is a judicial act on the part of its governing body, and that, therefore, the city is not responsible in damages if the plan adopted is insufficient or defective. On the other hand, it is held that the duty of a municipal corporation to provide drains and sewers is ministerial in its character and not judicial, and that municipal corporations are liable for the safety, sufficiency, and the skillful construction of its sewers and system of drainage. In *City of Indianapolis v. Huffer*, 30 Ind. 285, it was held that an 'incorporated city is not ordinarily liable for consequential injuries to private property resulting from the grading and improvement of its streets, if, in making such improvements, reasonable skill and care be used to avoid the injuries. The skill and care which is incumbent relates as well to the plan as to the execution of the work; in the case of a sewer, to its capacity, as well as to the mechanism in its construction.' We think this is the better rule." In California it is held that where a city is authorized by legislative act to improve a water course, it is not liable for injuries caused by an overflow except where negligence is shown; and an ordinance providing for such improvement is not void because it fails to provide compensation to one whose land is injured. *De Baker v. Southern Cal. Ry. Co.*, 106 Cal. 257 (89 Pac. Rep. 610; 46 Am. St. Rep. 237). A town or city has no right to empty its sewage into a natural water course outside its limits to the injury of landowners. But in order to enjoin the construction of such sewer it must be shown that it constitutes a nuisance. *Robb v. Vil. of La Grange*, 158 Ill. 21 (42 N. E. Rep. 77).

TAXES AND TAX TITLES.

EPITOME OF CASES.

Sec. 797. Exemption from taxes. The state alone has power to grant exemption from taxation. *McTwiggan v. Hunter*, R. I. (33 Atl. Rep. 5). Exemptions from taxation are to be strictly construed. *Stahl v. Kansas Educational Ass'n*, 54 Kan. 542 (38 Pac. Rep. 796); *Portland H. Ben. Soc. v. Kelley*, 28 Ore. 173 (42 Pac. Rep. 8; 30 L. R. A. 167); *Congregation of United Brethren v. Comm'rs of Forsyth Co.*, 115 N. C. 489 (20 S. E. Rep. 626); *People v. Peoria Mercantile Lib. Ass'n*, 157 Ill. 869 (41 N. E. Rep. 557); *People v. Young Men's Christian Ass'n*, 157 Ill. 408 (41 N. E. Rep. 557). A provision exempting property of a religious educational association held by it "for the exclusive purposes of religion and education," does not exempt property devised to it for that purpose, if not exclusively used for such purpose, although such property is rented to a tenant, who pays rent therefor, which is appropriated exclusively for the purpose of education. *Stahl v. Kansas Educational Ass'n*, 54 Kan. 542 (38 Pac. Rep. 796). The failure of a municipality to collect taxes on all property which it had the right to tax cannot create an exemption by estoppel. *Portland H. Ben. Soc. v. Kelley*, 28 Ore. 173 (42 Pac. Rep. 8; 30 L. R. A. 167). Where the right to have lands exempt from taxes fails on account of the statute under which it is claimed being declared unconstitutional, the municipal authorities are not estopped to refuse exemption to such lands on account of their having received other taxes from the owner thereof assessed under the provisions of such void statute. *Northern Pac. R. Co. v. McGinnis*, 4 N. Dak. 494 (61 N. W. Rep. 1032). Where a municipal corporation contracts with a party to exempt property from taxation, which contract is invalid on account of its lack of power to make it, such city is not

estopped from asserting the invalidity of the contract by reason of its having accepted the benefits thereof. *McTwiggan v. Hunter*, R. I. (33 Atl. Rep. 5). Particular cases in which agricultural lands within city limits are held exempt from taxation for general city purposes. *Taylor v. City of Waverly*, Ia. (63 N. W. Rep. 347).

Sec. 798. Exemption from taxes—Statutes construed. Statutes exempting property cannot have a retroactive effect, and will not give validity to a prior contract for exemption, although made with reference thereto. *McTwiggan v. Hunter*, R. I. (33 Atl. Rep. 5). Under Act of Congress July 10, 1886, lands granted to a railroad corporation are taxable, "but this provision shall not apply to lands not surveyed." *Northern Pac. R. Co. v. McGinnis*, 4 N. Dak. 494 (61 N. W. Rep. 1032). Lands of a city exempt generally from taxation are subjected to an assessment for irrigation purposes under Cal. Act March 7, 1887. *San Diego v. Linda Vesta Irr. Co.*, 108 Cal. 189 (41 Pac. Rep. 291). The right of exemption from taxation granted to certain railroad property by the internal improvement statute of Fla. (Fla. Acts 1855-56, Ch. 610; McClell. Dig., p. 596, § 21) is not a continuing exemption which passes as incident to the property, but a personal privilege which does not pass with the assignment of the property. *Bloxham v. Florida Cent. & P. R. Co.*, 35 Fla. 625 (17 So. Rep. 902). A statute (Ill. Rev. Stat. 1893, Ch. 32, § 88) exempting from taxation the stock and notes of a building and loan association was held unconstitutional. *People's L. & H. Ass'n v. Keith*, 153 Ill. 609 (39 N. E. Rep. 1072; 28 L. R. A. 65). Under McClain's Ia. Code, § 1271, exempting grounds and buildings of literary institutions "devoted solely to the appropriate objects of these institutions, * * * and not leased or otherwise used with a view to pecuniary profit," it is held that vacant and unused land held by such an institution for sale, the proceeds of which do not appear to be restricted to any particular use, is not exempt. *Foy v. Coe College*, Ia. (64 N. W. Rep. 636). Ky. Act May 5, 1884, construed—exemption of newly built railroad. *Commonwealth v. Louisville, St. L. & K. Ry. Co.*, Ky. (31 S. W. Rep. 464). A statute (Ky. Act

April 24, 1882) incorporating a railroad company, and clothing it "with all the rights, privileges, and powers" given to another company under its charter, does not give it an exemption from taxation granted to such other company by its charter. *Nashville, C. & St. L. R. Co. v. Commonwealth*, Ky. (80 S. W. Rep. 200). Minn. Con., Art. 9, § 8, which provides that "public property used exclusively for any public purpose" shall, by general laws, be exempted from taxation, and the legislation on the subject (Gen. St. 1894, § 1512) cannot be construed as authorizing the exemption of real property owned and leased by a private party who receives and retains all revenues derived from such leasing, although, under a contract with the owners, the authorities of the municipality in which the property is situated have ordained that such property shall be a public market house or place, and shall be exempt from taxation, and it is thereafter exclusively used for such public purposes, the authorities regulating the business to the extent necessary for the public welfare. *State v. Cooley*, 62 Minn. 188 (64 N. W. Rep. 879; 29 L. R. A. 777). N. J. Act March 30, 1868 (Pub. Laws 1868, p. 551), construed and applied—exemption of railroad property. *United N. J. R. & C. Co. v. Mayor of Jersey City*, 57 N. J. L. 563 (31 Atl. Rep. 1020). For compilation and construction of statutes of New Jersey concerning the exemption from taxation of rural cemeteries, see *City of Newark v. Mt. Pleasant Cem. Co.*, N. J. L. (33 Atl. Rep. 396). N. Y. Laws 1880, Ch. 542, as amended by laws 1881, Ch. 361, applied—exemption of property of a manufacturing corporation. *People v. Roberts*, 145 N. Y. 375 (40 N. E. Rep. 7). For construction and application of the statutes of New York in regard to the exemption from taxation of property of manufacturing corporations, see *People v. Campbell*, 145 N. Y. 587 (40 N. E. Rep. 239). A statute (N. C. Act 1893, Ch. 296, § 20) exempting property from taxation the rental of which is applied "exclusively to the support of the gospel" does not apply where the rental of such property is applied to educational, religious, and charitable purposes. *Congregation of United Brethren v. Comm'rs of Forsyth Co.*, 115 N. C. 489 (20 S. E. Rep. 626). N. Dak. Laws 1883, Ch. 99, commonly known as the "Gross Earnings Law," was repugnant to U.

S. Rev. Stat., § 1925, and void. The exemption of the land of a railroad grant thereunder falls with the statute, and such lands are subject to taxation before the question of their non-numerical character has been finally determined. *Northern Pac. R. Co. v. McGinnis*, 4 N. Dak. 494 (61 N. W. Rep. 1082). Where the statute exempts only such realty of certain institutions as shall be actually occupied for the purpose for which they were incorporated, the exemption does not extend to real estate which is occupied for other purposes, although the revenues received therefrom may be used for the purpose of the corporation. Hill's Ann. Ore. Laws, § 2782, construed and applied. *Portland H. Ben. Soc. v. Kelley*, 28 Ore. 178 (42 Pac. Rep. 8; 80 L. R. A. 167). See opinion for extensive collation of authority. Pa. Act. June 4, 1879, P. L. 90, applied—exemption of property of institutions of charity; incomplete building. *City of Philadelphia v. Keystone Battery A, Nat. Guard*, 169 Pa. 526 (82 Atl. Rep. 428). Where a part of property is exempt from taxation, the whole of it cannot be sold to pay taxes delinquent on part of it. S. C. Rev. Stat., § 222; Act December 24, 1892, applied. *City of Columbia v. Tindal*, 48 S. C. 547 (22 S. E. Rep. 841). S. Dak. Comp. Laws, § 1542, subd. 14, construed and applied—exemption of prairie land on account of tree culture. *Grigsby v. Minnehaha Co.*, S. Dak. (62 N. W. Rep. 105).

Sec. 799. Exemption from taxes—Special assessments. A general exemption from taxation does not include special assessments for local improvements. *In re Broad Street in Sewickley Borough*, 165 Pa. St. 475 (80 Atl. Rep. 1007). The court say: "The constitutional exemption relates to taxes proper, or general public contributions, levied and collected by the state, or by its authorized municipal agencies, for general governmental purposes, as distinguished from peculiar forms of taxation or special assessments imposed upon property, within limited areas, for the payment of local improvements therein, by which the property assessed is specially and peculiarly benefited and enhanced in value to an amount at least equal to the assessment. There is such an obvious distinction between all forms of general taxation and this species of local or special taxation, that we cannot think

the latter was intended to be within the constitutional exemption. The distinction is recognized in several of our own cases, among which are *Northern Liberties v. St. John's Church*, 18 Pa. St. 104; *Pray v. Northern Liberties*, 31 Pa. St. 69. In the former it was held that an assessment for pitching, curbing, and paving a street was not a tax within the meaning of the act of April 16, 1838, exempting churches and burial grounds from taxes. In none of the cases, however, which we have had occasion to examine, are the distinction and its legitimate result so clearly and forcibly pointed out as they are in *Railroad Co v. Decatur*, 147 U. S. 190, 197, wherein it is held that an exemption from taxation is to be taken as an exemption from the burden of ordinary taxes, and does not relieve from the obligation to pay special assessments imposed to pay for local improvements, and charged upon contiguous property upon the theory that it is benefited thereby." To the same effect are the following cases: *City of New Castle v. Stone Church Graveyard*, 172 Pa. 86 (38 Atl. Rep. 286); *San Diego v. Linda Vesta Irr. Co.*, 108 Cal. 189 (41 Pac. Rep. 291).

Sec. 800. Exemption of property of churches and charitable institutions. Hill's Ann. Ore. Laws, § 2732, exempting from taxation the property of "charitable" institutions, is held to apply to such an institution although its benefactions are confined to its members or their families. *Portland H. Ben. Soc. v. Kelley*, 28 Ore. 173 (42 Pac. Rep. 8; 80 L. R. A. 167). The court say: "It is not essential to charity that it shall be universal. That an institution limits the dispensation of its blessings to one sex, or to the inhabitants of a particular city or district, or to the membership of a particular religious or secular organization, does not, we think, deprive it, either in legal or popular apprehension, of the character of a charitable institution. If that only be charity which relieves human want, without discriminating amongst those who need relief, then, indeed, it is a rarer virtue than has been supposed. And, if one organization may confine itself to a sex or church or city, why not to a given fraternity? So narrow a definition of charity as the third paragraph presupposes is not, that we are aware of, ever

attached to it; and we are not at liberty to circumscribe the effect of the statute, and defeat its intention, by affixing to its terms an unusually limited meaning.' So also, in *City of Petersburg v. Petersburg Ben. Mechanics' Ass'n*, 78 Va. 431, it was held that an association which applies its revenues to the payment of current expenses, and to the relief of its indigent members and the families of such as have died in need, was a charitable institution. 'These are charitable purposes,' says the court, 'and the relief afforded is none the less charity because confined to members of the association and the families of deceased members. It is not essential to charity that it shall be universal.' And, again, in *Book Agents of M. E. Church v. Hinton*, 92 Tenn. 188 (21 S. W. Rep. 321; 19 L. R. A. 289), it was held that a corporation created as an arm or agency of the Methodist Church, and charged with the duty of manufacturing and distributing books, periodicals, etc., in the interest and under the auspices of the church, and thereby raising a fund with which to support its worn-out preachers and their families, is a religious and charitable institution, within the meaning of the provision of the constitution exempting such institutions from taxation. From an examination of this question and all the authorities within our reach bearing upon it, we take the result to be that an institution organized for benevolent and charitable purposes, free from any element of private or corporate gain, and which devotes its entire revenue to the payment of current expenses and the relief of the poor and needy, is a charitable institution, within the meaning of the law, although it may confine its benefits primarily to its own members and their families." In construing Ia. Code, § 737, which provides that "All * * * grounds and buildings of * * * religious institutions, and societies devoted solely to the appropriate objects of these institutions, * * * and not leased or otherwise used with a view to pecuniary profit; provided, that all deeds by which such property is held shall be duly filed for record before the property therein described shall be omitted from the assessment," it is held that where one seeks to exempt church property thereunder he must allege and prove that the deeds thereto have been recorded; and it is also held that the statute does not exempt lots purchased for the purpose of the

erection of a church thereon, which purpose is subsequently abandoned and the lots mortgaged to raise money to build a church elsewhere. *Nugent v. Dilworth*, Ia. (68 N. W. Rep. 448). A statute (Ill. Rev. Stat. 1898, ch. 120, § 2, cl. 2) exempting "all church property actually and exclusively used for public worship," does not exempt a building of a Young Men's Christian Association which is used partly for the association and partly rented for business purposes. *People v. Young Men's Christian Ass'n*, 157 Ill. 408 (41 N. E. Rep. 557). The property of a school cannot be exempt on the ground that it belongs to an institution of charity, where from all the facts it is apparent that the school is conducted as a business enterprise, for the reason that at the time it was originally endowed it was provided that the children of the rich should be educated at reasonable rates, and the poor gratuitously. *City of Philadelphia v. Overseers of Public Schools*, 170 Pa. 257 (32 Atl. Rep. 1033; 29 L. R. A. 600).

Sec. 801. Assessment of taxes—Statutes construed. There can be no valid sale of realty for taxes improperly levied and assessed. *Cunningham v. Brown*, 89 W. Va. 588 (20 S. E. Rep. 615); *Font v. Gulf St. L. & Imp. Co.*, 47 La. 272 (16 So. Rep. 828); *Gulf States L. & Imp. Co. v. Succession of Fasnacht*, 47 La. 1294 (17 So. Rep. 800). A sale cannot be invalidated because of the fact that a part of the taxes for which it was sold were incorrectly assessed, another portion of said taxes having been regularly and legally assessed. La. Acts 1884, No. 82, applied. *Dibble v. Leppert*, 47 La. 792 (17 So. Rep. 809); but the assessment of a tax to pay a sum illegally added to the tax levy will operate to invalidate a tax sale made thereunder. *Wagar v. Bowley*, 104 Mich. 88 (62 N. W. Rep. 298). A sale of land not listed in the owner's name passes no title. *Spalding v. Thompson*, Ky. (30 S. W. Rep. 20). The assessment should conform to the recorded titles. La. Act No. 85, § 1888, applied. *Gulf States L. & Imp. Co. v. Succession of Fasnacht*, 47 La. 1294 (17 So. Rep. 800). For the purpose of ascertaining who is the owner in order that the land may be properly assessed for taxation, the officer may resort to the duly certified copy of entries made on the books of any register of any United States

land office on file in the county, and the person who appears from this copy to have entered the land will be taken as the true owner, unless other records of the county show the title to be in some other person. *Nolan v. Taylor*, 131 Mo. 224 (32 S. W. Rep. 1144). A sale based upon an assessment of lands in the name of one after he has parted with them by devise is void and ineffectual as against his devisee. *Williams v. Landry*, 47 La. 5 (16 So. Rep. 591). An assessment in the name of a dead man, many years after his death, is irregular, and a sale made thereon is invalid. *Edwards v. Fairex*, 47 La. 170 (16 So. Rep. 736). To the same effect is the case of *Washington v. McCombs*, Ky. (32 S. W. Rep. 898). Particular assessment of lands in one's name as "tutor," without giving the names of his wards, held sufficient. *Dibble v. Leppert*, 47 La. 792 (17 So. Rep. 809). Where several tracts or parcels of land are assessed and sold for taxes, and the amount of taxes assessed upon each of said tracts is not set down or given opposite thereto, respectively, in the assessment roll, and in the collector's advertisement of sale, but the aggregated taxes assessed on all of the different tracts is given only, a tax deed predicated thereon is void. *Levy v. Ladd*, 35 Fla. 391 (17 So. Rep. 635). A statute (Wash. Laws 1891, Ch. 140, § 48, p. 298) providing that the assessing officer "shall actually view and determine, as nearly as practicable, the true and fair value of each tract or lot of real property listed for taxation, and shall enter the value thereof, including the value of all improvements and structures thereon, opposite each description of property," is held to be mandatory, and a failure to comply therewith invalidates the assessment. *Lockwood v. Roys*, 11 Wash. St. 697 (40 Pac. Rep. 346); *Young v. Joslin*, 13 R. I. 675; *Hayden v. Foster*, 13 Pick. 499; *Nason v. Ricker*, 63 Me. 381. A description of land returned by the collector for sale on account of nonpayment of taxes which merely gives the name of the owner, the street on which the lot is located, and the ward in which it is situated, the person named as owner having never been in possession and is in no way connected with the recorded title, is insufficient. *Van Loon v. Engle*, 171 Pa. 157 (33 Atl. Rep. 77). A water power constitutes a part of the real estate upon which it is situated and should be assessed as such. *Amoskeag Mfg. Co. v. Concord*, 66 N. H.

562 (32 Atl. Rep. 151; 29 L. R. A. 57). Standing timber should be assessed for taxes in the county in which it is situated irrespective of the residence of the owner. *Coldiron v. Kentucky L. Co.*, Ky. (32 S. W. Rep. 224). A block owned by one person which is covered with buildings so joined together as to appear like one block, although they front on different streets, may be assessed as one piece of property. *Jacobs v. Buckalew*, Ariz. (42 Pac. Rep. 619). Under Cal. Const., Art. 18, § 2, providing that "land and the improvements thereon shall be separately assessed," an assessment of the property of a railroad, as the "land" occupied by the company as a right of way, "together with" the track, is invalid. *California & N. R. Co. v. Mecartney*, 104 Cal. 616 (38 Pac. Rep. 448). Municipal authorities are not required to give an owner notice of the assessment of a portion of his property because they have in previous years erroneously omitted it from assessment as being exempt. *Foy v. Coe College*, Ia. (64 N. W. Rep. 636). A tax assessment is not invalid because not completed during the year for which it was made. As a general rule, a provision in a statute naming the time when an act is to be done in the assessment and collection of taxes is a direction, and not a limitation. *Stieff v. Hartwell*, 35 Fla. 606 (17 So. Rep. 899). The failure of assessors to meet at the time fixed by statute (N. Y. Rev. Stat., p. 898, § 20) to review assessments and hear objections, is a mere irregularity which does not render void a sale for taxes based on such assessments, inasmuch as the statute gives the owner the right to appeal. *People v. Turner*, 145 N. Y. 451 (40 N. E. Rep. 400). See 3 Ballards' Annual, § 720, p. 878. Under a statute (Minn. Gen. Laws 1874, Ch. 1, § 112) which requires the county commissioners to designate the newspaper in which the list of delinquent taxes shall be published, either at their annual meeting in January, or at a meeting of the said board to be held on the third Monday in June in each year, a delay in the performance of this duty beyond the third Monday in June in any year, and the performance of it at a later date, is held to be an irregularity which invalidates tax sales affected thereby. Start, C. J., and Mitchell, J., dissenting. *Finnegan v. Gronerud*, Minn. (65 N. W. Rep. 128). A statute (Ia.

Code, § 845) requiring an officer having the collection of taxes in charge to enter opposite each parcel of property previous delinquent taxes does not apply to taxes for which a sale of property has already been made. *Hoben v. Snell*, Ia. (62 N. W. Rep. 789). The schedule filed by a railroad company under Ill. Rev. Stat., Ch. 120, § 41 (2 S. & C. Ann. Stat., p. 2042), is binding as to whether certain lands are part of the right of way or "other lands." *Iowa Cent. Ry. Co. v. People*, 156 Ill. 373 (40 N. E. Rep. 954). Overruling *Railway Co. v. Goar*, 118 Ill. 134 (8 N. E. Rep. 682). 1 N. Y. Rev. Stat. 898, § 17, construed and applied—valuation of real property. *People v. Barker*, 146 N. Y. 304 (40 N. E. Rep. 996). Under Ill. Rev. Stat. 1898, Ch. 120, § 191, an assessment is not invalidated by errors which do not affect a substantial right. *Hammond v. Carter*, 155 Ill. 579 (40 N. E. Rep. 1019).

Sec. 802. Assessment of taxes—Omitted property. All property ought to bear its burden of taxation; and there can be no doubt, because it is well established by authority, that if property lawfully liable thereto escapes taxation for any one or more years, it is competent for the legislature to provide for the collection of such taxes in arrears from the owners of the property during the time for which it escaped taxation, or from purchasers of the same whose rights or titles accrued after a lien for such taxes had been acquired by the state, by subjecting the property taxed to the payment of the same; but when the time for the assessment and collection of taxes has passed, and the taxing statute affixes no lien to the property, and the state has made no assessment, nor taken any other step to collect the same, real estate cannot be pursued for back taxes when it has gone into the hands of innocent purchasers for value. *Bloxham v. Florida Cent. & P. R. Co.*, 35 Fla. 625 (17 So. Rep. 902). Where the contract of a city to exempt property from taxation is invalid, but its assessors honestly believe it to be otherwise and acting on their belief omit such property from their assessment, the assessment is not thereby rendered invalid. *McTwiggan v. Hunter*, R. I. (38 Atl. Rep. 5). The court say: "Accidental omissions, or omissions arising merely from mistakes of law or

fact or errors of judgment, in an honest endeavor on the part of the assessors to perform their duty, though increasing somewhat the burdens of taxpayers, will not render the assessment void. In *Weeks v. City of Milwaukee*, 10 Wis. 264, it is said: 'Omissions of this character, arising from mistakes of fact, erroneous computations, or errors of judgment on the part of those to whom the execution of the taxing laws is intrusted, do not necessarily vitiate the whole tax. But intentional disregard of those laws, in such manner as to impose illegal taxes upon those who are assessed, does. The first part of the rule is necessary to enable the taxes to be collected at all. The execution of these laws is necessarily intrusted to men; and men are fallible, liable to frequent mistakes of fact and errors of judgment. If such errors on the part of those who are attempting in good faith to perform their duties should vitiate the whole tax, no tax could ever be collected. And, therefore, if they sometimes increase improperly the burdens of those paying taxes, that part of the rule which holds the tax not thereby avoided is absolutely essential to the continuance of the government. But it seems to me clear that the other part is equally essential to the just protection of the citizen. If those executing these laws may deliberately disregard them and assess the whole tax upon a part only of those who are liable to pay it, and have it still a legal tax, then the laws afford no protection, and the citizen is at the mercy of those officers who, by being appointed to execute the laws, would seem to be thereby placed beyond legal control.' And see *Wilson v. Wheeler*, 55 Vt. 446, 453, 454; *Henry v. Chester*, 15 Vt. 460, 467; *Spear v. Braintree*, 24 Vt. 414, 418; *Dillingham v. Snow*, 5 Mass. 547, 558, 559; *Van Deventer v. Long Island City*, 139 N. Y. 183, 188 (84 N. E. Rep. 774); *State v. Platt*, 24 N. J. L. 108, 120, 121; *Bank v. Hines*, 3 Ohio St. 1; *Fifield v. Marinette Co.*, 62 Wis. 532, 541 (22 N. W. Rep. 705); *Railroad Co. v. Seward Co.*, 10 Neb. 211, 216 (4 N. W. Rep. 1016); *Railroad Co. v. Saline Co.*, 12 Neb. 896, 897 (11 N. W. Rep. 854); *People v. McCreery*, 34 Cal. 434, 458; Cooley, Tax'n (2d Ed.), 214, 217." Ill. Rev. Stat. 1893, Ch. 120, § 276, construed and applied—assessment of omitted property. *Hayward v. People*, 156 Ill. 84 (40 N. E. Rep. 287).

Sec. 803. Lien for taxes. Taxes, once levied, become a lien on real estate until paid or barred by law, and one who purchases such real estate at an invalid tax sale becomes subrogated to such lien. *Weston v. Myers*, 45 Neb. 95 (63 N. W. Rep. 117). Taxes assessed are not a lien until the time fixed by law for them to become so. *Bradley v. Dike*, 57 N. J. L. 471 (32 Atl. Rep. 132). A lien for taxes is superior to a mortgage lien. *Spalding v. Thompson*, Ky. (30 S. W. Rep. 20). Under Ind. Rev. Stat. 1881, §§ 6446, 6447, the state has a paramount lien for taxes on all the property of the owner, and this lien is not merged in a judgment rendered in a proceeding to collect delinquent taxes under Elliott's Supp. Ind. Stat., § 2147, so as to prevent its enforcement against the property of the debtor for any balance remaining unpaid. *Beard v. Allen*, 141 Ind. 243 (39 N. E. Rep. 665; 40 N. E. Rep. 654). Under Neb. Comp. Stat. 1893, Ch. 77, § 44, "the owner of property on the first day of April in any year shall be liable for the taxes of that year." *Campbell v. McClure*, 45 Neb. 608 (63 N. W. Rep. 920). In Nebraska, an action to foreclose a tax lien is barred within five years after the time to redeem from the tax sale has expired. *Alexander v. Thacker*, 43 Neb. 494 (61 N. W. Rep. 738). Pa. Act Apr. 14, 1827, (Purd. Dig., p. 1386); Act June 7, 1879; Act June 1st, 1889, construed and applied—loss of lien. *In re Goodwin Gas-Stove & M. Co.'s Estate*, 166 Pa. 296 (31 Atl. Rep. 91).

Sec. 804. Discharge of tax lien by payment of amount demanded by the collecting officer. Where a statute (Mo. Rev. Stat. 1889, § 7606) makes it the duty of an officer to furnish taxpayers with a statement of the amount of taxes due from them, upon demand, one who pays all the taxes demanded by the officer from him, in such a case, thereby discharges his land from any lien for taxes due but omitted from the officer's statement. *Harness v. Cravens*, 126 Mo. 233 (28 S. W. Rep. 971). The court say: "In regard to ordinary tax liens, it has been ruled that if the proper officer, authorized to do so, gives a statement or certificate that there are no back taxes due, the purchaser applying for it is protected, although the officer has erred. In such case, the tax books not showing any tax to be due, the lien of delinquent

taxes then existing, but not brought forward, could not be asserted against such purchaser, who took the land discharged of such lien. *Fiska v. Ringgold Co.*, 57 Iowa 680 (11 N. W. Rep. 618). In Pennsylvania this case arose: The owner of land went to the proper office to pay his taxes, and a list was made out for him, from which, by mistake, a road tax was omitted. He paid all the list called for, and it was held in an action of ejectment that for all the purposes of a sale this was equivalent to full payment; that the statement and receipt in that case, their correctness not being assailed, were clear evidence that the owner asked the officer for the taxes due by him, and paid all that was demanded; and that after this was done the owner was not bound to take notice of subsequent steps to a sale, and the sale was without jurisdiction; and that a *bona fide* attempt to pay the taxes, frustrated by the fault of the officer, stands as the equivalent of actual payment. *Breisch v. Cox*, 81 Pa. St. 836. In that case Agnew, C. J., delivered the opinion of the court, remarking: 'It must be conceded that the payment of taxes is a duty, and the failure to perform it is the fault of the owner. But payment is one thing, and steps leading to it are another. For the latter the owner is not responsible. He cannot assess himself, or know what is charged against him. He must await the action of the agents of the law. He cannot pay until he is informed of what he is to pay. To perform the duty of payment he must apply to the treasurer for the taxes charged against his land. If this officer fail to give him this information on demand, on what just principle shall it be said he has not performed his duty? It is said "There are the tax books open to inspection. Let him search them." But this is neither his business nor his duty. As was said in *Dietrick v. Mason*, 57 Pa. St. 40, the treasurer is the legal custodian of the books and entries of the taxes necessary to show the sum to be tendered. This information it is his duty to give, and he cannot lay the books before the owner, and compel him to search for himself. The knowledge of the latter may be inadequate to find what he needs. If, then, the owner pays all the taxes stated by the treasurer, he has done his whole duty. He can do no more. *Baird v. Cahoon*, 5 Watts & S. 540; *Laird v. Hiester*, 24 Pa. St. 464. His claim to be protected against a

sale of his land for taxes he stood ready to pay, but which the proper officer has failed to present to him on demand, is quite as great as that of the purchaser to be protected against the act of the same officer in making a sale for taxes actually paid. Indeed his equity is greater, for he has a prior title to the land, which has been wrongfully exposed to sale for an unknown trifle of tax. He would lose a valuable property, sold for no real equivalent, while the purchaser pays but a trifle of taxes and costs, which, in most instances, he can have returned to him if the sale be void. In point of want of knowledge they stand upon a par; the owner's ignorance of the tax being the equivalent of the purchaser's ignorance of the attempt to pay it. As a matter of fact, too, purchasers at tax sales are known to be full of risk, and rarely more than a tithe of the value of the land is bid. It is but just, then, that a *bona fide* attempt to pay all the taxes, frustrated by the fault of the treasurer, should stand as the equivalent of an actual payment.'"

Sec. 805. Tax sale—Exhaustion of personal property first. In Pennsylvania land cannot be sold for taxes until after a failure to collect the same from the personal property on the premises, or by demand on the owner individually. *Kean v. Kinnear*, 171 Pa. 639 (83 Atl. Rep. 325). The fact that personal property is mortgaged does not excuse an officer from complying with a statute requiring him to exhaust personal property before selling real estate. Ky. Gen. Stat., Ch. 92, Art. 9, § 15, applied. *Spalding v. Thompson*, Ky. (80 S. W. Rep. 20).

Sec. 806. Tax sale—Notice. A sale made without the notice required by law is void. *Woolfork v. Buckner*, 60 Ark. 163 (29 S. W. Rep. 372); *Johnson v. Harper*, 107 Ala. 706 (18 So. Rep. 198), applying Ala. Code, § 576. The same is held under Ill. Rev. Stat. 1893, Ch. 120, § 182. *Langlois v. Stewart*, 156 Ill. 609 (41 N. E. Rep. 177). A notice of sale published on February 11, 1891, for a sale on March 3, is a twenty day notice. *Carpenter v. Shinnors*, 108 Cal. 359 (41 Pac. Rep. 473). The fact that copies of all the issues of a paper in which a tax sale notice should appear are not to be found in the files of such paper kept by its publisher is not

proof that such notice was not properly given. *Bedgood v. McLane*, 94 Ga. 288 (21 S. E. Rep. 529).

Sec. 807. Tax sale—Time and manner of making. In Pennsylvania a sale for taxes must be made within two years from the time when they became a lien. *State v. Mayor etc. of Rutherford*, N. J. L. (82 Atl. Rep. 688). In construing Miss. Code 1880, § 527, which requires the officer to resell the land unless the purchaser pays his bid immediately, it is held that a tax sale is not rendered void because the officer did not collect the purchase price until four days after the sale, no previous arrangements between him and the purchaser in regard to such delay being shown. Whitfield, J., dissenting. *Judah v. Brothers*, 72 Miss. 616 (17 So. Rep. 752). Mich Laws 1889, Act No. 195, § 66, applied—filing report of sale. *Fenkinson v. Auditor General*, 104 Mich. 84 (62 N. W. Rep. 168). W. Va. Code 1887, Ch. 81, §§ 9, 18, construed and applied—purchase by officer making sale—affidavit required of officer. *Phillips v. Minear*, 40 W. Va. 58 (20 S. E. Rep. 924). La. Acts 1873, No. 47, applied—duty of officer to make seizure of property before sale. *Mays v. Withowski*, 46 La. 1475 (16 So. Rep. 478).

Sec. 808. Tax sale—Sale in solido or in parcels. The whole of a tract of land should not be sold when a bid equal to the amount due is offered for a portion thereof. *Glos v. Swigart*, 156 Ill. 229 (41 N. E. Rep. 42). A tax sale of property in its entirety, composed of distinct portions acquired under separate titles, will not be sustained if it is reasonably certain that a smaller portion could have been sold for enough to pay unpaid taxes, interest and costs. The constitutional requirement that the tax collector shall sell at the tax sale the least quantity of property that will bring the unpaid taxes is not fulfilled by the statement that he offers any portion that any one will buy. The offer should be of a portion specific as to quantity and location, so that the purchaser may know what he buys, and that delivery may be made. La. Const., Art. 210, construed. *Gulf States L. & Imp. Co. v. Succession of Fasnacht*, 47 La. 1294 (17 So. Rep. 800). Where a statute requires the land to be sold as a whole, a sale of a part thereof is void although sufficient was realized therefrom to

pay the amount of taxes, penalty and costs. *Richards v. Howell*, 60 Ark. 215 (29 S. W. Rep. 461). Ariz. Rev. Stat., par. 2694, requiring the officer to offer a designated portion of the property before offering the whole, is mandatory. *Jacobs v. Buckalew*, Ariz. (42 Pac. Rep. 619).

Sec. 809. Purchaser at a tax sale—Title acquired by and rights of. One who asserts a title through a tax sale and deed takes upon himself the burden of showing that every step required by law to be taken, from the listing of the land for taxation to the delivery of the deed, has been regularly taken. *Mattox v. Stephens*, 140 Ind. 282 (39 N. E. Rep. 460). A vendee of a tax title who takes it "subject to all liens and incumbrances now existing" holds subject to a prior mortgage. *Oliphant v. Burns*, 146 N. Y. 218 (40 N. E. Rep. 980). Where lands belonging to the heirs of a decedent were assessed in the name of his widow a tax sale thereof passes only the widow's dower. *Payne v. Arthur*, Ky. (29 S. W. Rep. 860). Where a homestead is sold for taxes, the fee simple of which had passed to another by a previous execution sale, the purchaser at the tax sale acquires only the remaining rights of the homestead claimant. *Crine v. Johns*, 96 Ga. 220 (22 S. E. Rep. 918). Where one requests another to purchase his property at a tax sale, intending thereby to vest in him, as a gift, title to the property, if the title fails to vest because of the invalidity of the sale, the gift is defeated. *Stone v. Engstrom*, R. I. (82 Atl. Rep. 916). Under Neb. Comp. Stat., Ch. 77, § 181, upon foreclosure of a valid tax sale certificate the plaintiff is entitled to recover the amount bid at the tax sale, and the several sums paid for prior and subsequent taxes, together with interest on said several amounts, from the date of payment, at the rate of 20 per cent. per annum until the expiration of two years from the date of purchase, and 10 per cent. per annum thereafter, and an attorney's fee equal to 10 per cent. of the amount of the decree. *Alexander v. Thacker*, 43 Neb. 494 (61 N. W. Rep. 738); *Osgood v. Grant*, 44 Neb. 350 (62 N. W. Rep. 894). Colo. Gen. Stat. 1883, § 2934, p. 862, construed and applied—rights of holder of tax title to recover for improvements. *Knowles v. Martin*, 20 Colo. 393 (38 Pac. Rep. 467). S. C. Act 1887 (19 Stat.

862) applied—duty of sheriff to put purchaser in possession. *State v. Morrison*, 44 S. C. 470 (22 S. E. Rep. 605).

Sec. 810. Right of purchaser at an invalid tax sale.

One holding under an invalid tax title has no right to remove buildings which were on the land at the time the taxes were levied, and will be required to account for the same on adjusting the amount due upon the setting aside of the title. *Uhl v. Small*, 54 Kan. 651 (39 Pac. Rep. 178). S. Dak. Comp. Laws 1893, ch. 161, which provides that the holder of a tax sale certificate which is void because the property sold was not liable for taxation may have the money paid therefor refunded to him, does not have a retroactive effect. *American Inv. Co. v. Thayer*, S. Dak. (63 N. W. Rep. 233). In an action under S. Dak. Comp. Laws, § 1629, by a purchaser to recover from the county the amount paid, with interest, where land has been sold upon which no taxes were due at the time; it is not necessary to show the making of a previous demand for such repayment. *Boynton v. Faulk Co.*, S. Dak. (64 N. W. Rep. 518). In construing Minn. Rev. Stat. 1866, ch. 11, § 155, under which a purchaser at a tax sale had the right to have the purchase money refunded to him when such sale was "declared void by judgment of court," it is held that where the action in which such judgment was rendered was commenced twenty-three years after such sale the right to refundment was barred; that the holder of the tax title could have begun a suit himself to determine its validity, and that the limitation to be applied by analogy to the performance of this condition precedent is not the six year limitation, which would be applied to the cause of action for refundment when it accrues, but the fifteen year limitation, which applies to actions for the recovery of real estate; and, if such tax sale is not declared void by a judgment in an action commenced within fifteen years after the time to redeem from such sale expires, the right to refundment is barred, whether the real estate is adversely held by either party, or is vacant during such fifteen years. *State v. Norton*, 59 Minn. 424 (61 N. W. Rep. 458).

Sec. 811. Irregularities which avoid or invalidate tax sales. In Arkansas it is held that a tax sale for thirty-

five cents more than was due is void. *Cooper v. Freeman Lumber Co.*, 61 Ark. 86 (81 S. W. Rep. 981). A tax sale of land conveyed to the delinquent by a void deed from the county passes no title. *Moss v. Kauffman*, 131 Mo. 424 (33 S. W. Rep. 20). Where the failure of an owner to pay taxes for which his land is sold was occasioned by the officer having illegally assessed the land in the name of another, such sale is invalid. *Cunningham v. Brown*, 39 W. Va. 588 (20 S. E. Rep. 615). The previous payment of taxes, no matter by whom paid, will defeat a tax title, and payment may be proven by parol. *Nickum v. Danvers*, 28 Ore. 322 (42 Pac. Rep. 130). A sale of land for unpaid taxes levied according to a legal description of the premises is void when the same premises had been assessed and taxed under a different description, which though not technically accurate was sufficient to identify the property, and the taxes thus levied had been paid by the owner of the land before the sale was made. *Rath v. Martin*, Ia. (61 N. W. Rep. 941). The validity of a tax sale is not affected by the honest, though erroneous, belief of the owner that he had paid the taxes thereon. *Wilson v. Marvin*, 172 Pa. 80 (33 Atl. Rep. 275). Where a tax title rests upon an affidavit which shows on its face that the statutory requirements have not been complied with the defect cannot be cured by extrinsic evidence. *Esker v. Hefferman*, 159 Ill. 88 (41 N. E. Rep. 1118).

Sec. 812. Setting aside tax sales—Practice. The owner of land may maintain an action to set aside a tax sale thereof after he has executed a bond for a deed and delivered possession to his obligee. *Langlois v. Stewart*, 156 Ill. 609 (41 N. E. Rep. 177). In an action brought to set aside a tax sale because the land was sold for a larger amount than necessary, the amount for which the land was sold is determined by the record of tax sales kept by the clerk, under Sand. & H. Ark. Dig., § 6612. *Cooper v. Freeman Lumber Co.*, 61 Ark. 86 (81 S. W. Rep. 981). Where a tax sale has been acquiesced in for more than eighty years, during which time the purchaser and his grantees have held possession, and the records relating thereto have been destroyed, the sale will be presumed to be valid. *Lenning's Ex'rs v. White*, Va. (20 S.

E. Rep. 881). One who seeks to set aside a tax sale should be required to pay the amount for which the property was sold although a statute (Mich. Laws, Act 1889, No. 195, § 66) requires the county treasurer to refund to the purchaser the amount of the debt, with interest, in case the sale is set aside. *Jenkinson v. Auditor General*, 104 Mich. 84 (62 N. W. Rep. 163). Particular bill to set aside the confirmation of a tax sale held sufficient on demurrer. *St. Louis & S. F. Ry. Co. v. Holton-Warren L. Co.*, 61 Ark. 50 (32 S. W. Rep. 117). Ill Rev. Stat. 1898, Ch. 120, § 224, applied — setting aside sale — tender required of plaintiff. *Langlois v. Stewart*, 156 Ill. 609 (41 N. E. Rep. 177). In construing Ia. Code, § 897, which provides that “no person shall be permitted to question the title acquired by a treasurer’s deed without first showing that he, or the person under whom he claims title, had the title to the property at the time of the sale, or that the title was obtained from the United States or this state after the sale,” it is held that one assailing a tax title does not bring himself within the meaning of the statute by testifying that he claims to own the land and has a deed therefor. *Baird v. Law*, Ia. (61 N. W. Rep. 1086).

Sec. 813. Setting aside tax sales—Power of legislature to prescribe reasons therefor. In construing Sand. & H. Ark. Dig., § 6625, specifying the reasons for which a tax title may be defeated, it is held that the legislature has no power to deny or cut off a meritorious defense of the land owner against the purchaser at a tax sale. Battle, J., and Boone, Sp. J., dissenting. *Cooper v. Freeman Lumber Co.*, 61 Ark. 86 (31 S. W. Rep. 981; 32 S. W. Rep. 494). The court say: “Under the decisions of this court in *Railway Co. v. Parks*, 82 Ark. 181, and in *Radcliffe v. Scruggs*, 46 Ark. 96, a substantial, ‘meritorious defense’ against a claimant under a purchase at a tax sale cannot be denied or cut off by the legislature. In *Radcliffe v. Scruggs*, the court, by Mr. Justice Smith, said: ‘And by “meritorious defense” we mean any act of omission of the revenue officers in violation of law and prejudicial to his [the former owner’s] rights or interests, as well as those jurisdictional and fundamental defects which affect the power to levy the tax or to sell for the nonpayment.

* * * Our legislation and previous decisions have always distinguished between this class of defects [mere irregularities or informalities], which have no tendency to injuriously affect the taxpayer, and substantial defects, such as go to the jurisdiction of the levying court to levy a particular tax, or to the power of the officer to sell for nonpayment, or the omission of any legal duty which is calculated to prejudice the landowner.' Can it be doubted—in fact, is it not very clear—that to sell a landowner's land for an amount not due upon it, and never levied upon it, and which, if levied, was unlawfully levied, has a direct tendency to injuriously affect his interest, and the power of the officer to sell for nonpayment? It is obvious that the defenses against the tax sales in this case are 'meritorious,' as that term is defined in *Radcliffe v. Scruggs*, and by the weight of authority, and that the legislature cannot deprive the property owner of such defense without, in the language of Mr. Justice Smith, 'transcending the boundaries of its power.' This is substantially the language of Judge Caldwell in *Martin v. Barbour*, 84 Fed. 701, in which the court was considering one of the provisions of this same statute, but not the exact question in this case. The smallness of the amount of the excess over the amount due does not, in a tax sale, affect the question, as the maxim, '*De minimis non curat lex*,' does not apply to tax sales. The provisions of the law made for the protection and benefit of the tax payer are mandatory. Though the act copied herein was passed since *Railway Co. v. Parks* and *Radcliffe v. Scruggs* were decided, it in no wise affects or unsettles the principle settled in these cases—that it is beyond the power of the legislature to take away from the property owner a 'meritorious defense' against a substantially defective tax sale, where the defect goes to the power of the court to levy the tax, or of the officer to sell for nonpayment."

Sec. 814. Redemption from tax sales—Statute construed. Redemption by the owner does not give him any new title. *Ivey v. Griffin*, 94 Ga. 689 (21 S. E. Rep. 709). An owner's right of redemption is not affected by the fact that the deed under which he holds was not recorded until after the tax sale. *Douglass v. Lowell*, 55 Kan. 574 (40 Pac.

Rep. 917). An order of redemption cannot be vacated except in some manner authorized by a statute. *People v. Wemple*, 144 N. Y. 478 (89 N. E. Rep. 357). In Massachusetts it is held that either the mortgagor or mortgagee whose mortgage has not been extinguished may redeem. *Stone v. Stone*, 163 Mass. 474 (40 N. E. Rep. 897). Ida. Rev. Stat., § 1554, authorizes the imposition of a 50 per-cent. penalty to be collected from the redemptioner upon the amount of tax and interest thereon, but not upon the costs and expenses. *Cummings v. Cone*, Idaho (38 Pac. Rep. 650). Ind. Rev. Stat. 1894, § 8610, requiring the redemptioner to pay "the purchase money * * * and all taxes which have been paid thereon with interest on such taxes," does not require the payment of interest on the amount paid at the tax sale. *Ristine v. Johnson*, 143 Ind. 44 (41 N. E. Rep. 538; 42 N. E. Rep. 810). Under Ia. Code, § 867, a petition to redeem after the execution of the deed which fails to allege that all taxes due upon the property have been paid is insufficient. *Medland v. Walker*, Ia. (64 N. W. Rep. 797). A premature issuance of a tax deed before the expiration of the time given for redemption does not affect the right of redemption. Kan. Laws 1879, Ch. 43, applied. *Noble v. Douglass*, Kan. (42 Pac. Rep. 328). Where the original tax certificate has been assigned to another and no record made of the assignment, and the original landowner who desires to redeem has no notice of the assignment, he is justified in making the necessary tender to the original holder of the tax certificate, and his right to redeem cannot be cut off by such secret assignment. Kan. Gen. Stat. 1889, Pars. 6987, 6988, applied. *Douglass v. McKeever*, 54 Kan. 767 (39 Pac. Rep. 703). Mass. Stat. 1888, Ch. 390, § 57, applied—redemption by true owner where sale has been made on assessment made in the name of another. *Stone v. Stone*, 163 Mass. 474 (40 N. E. Rep. 897). Minn. Gen. Stat. 1894, § 1662, applied—extension of time on account of death of owner. *State v. Halden*, 62 Minn. 246 (64 N. W. Rep. 568). Minn. Gen. Stat. 1878, § 92 (Gen. Stat. 1894, § 1604), as amended by Gen. Laws 1889, Ch. 185, construed and applied—redemption by lien holder—apportionment of lien. *Wade v. Drexel*, 60 Minn. 164 (62 N. W. Rep. 261). Miss. Acts 1875, p. 16,

Code 1871, §§ 1701, 1702, applied—redemption by minors. *McNamara v. Baird*, 72 Miss. 89 (16 So. Rep. 384). Under a statute (S. & B. Wis. Stat., § 1165) which gives the owner a right to redeem at any time before the tax deed is recorded, and Rev. Stat. 1166, which requires the county clerk to execute a tax deed “under his hand and the seal of the county,” it is held that the record of a deed so executed which fails to contain anything representing such official seal is so defective that it does not cut off the right to redeem. *Hiles v. Atlee*, 90 Wis. 72 (62 N. W. Rep. 940).

Sec. 815. Notice of expiration of time for redemption—Statutes construed. Under Cal. Pol. Code, § 8785, providing, that thirty days before the time for redemption expires, or thirty days before he applies for a deed, the purchaser must serve upon the owner a notice in which, among other things, must be stated “the time when the right of redemption will expire, or when the purchaser will apply for a deed,” service of a notice “that the time allowed by law for the redemption of said property will expire on the 14th day of May, A. D. 1892; and, unless redeemed sooner, the undersigned will hereafter apply to said tax collector for a deed,” was held insufficient. *California & N. R. Co. v. Mecartney*, 104 Cal. 616 (38 Pac. Rep. 448). The notice required by this statute cannot be given by posting until it is shown that the property is not occupied. *Hall v. Capps*, 107 Cal. 513 (40 Pac. Rep. 809). For an extensive consideration and construction of Ill. Rev. Stat. 1893, Ch. 120, § 216, in regard to notice by purchaser of expiration of time to redeem, see *Hammond v. Carter*, 155 Ill. 579 (40 N. E. Rep. 1019). A notice which misstates the section in which the land is situated is invalid. *Esker v. Hefferman*, 159 Ill. 38 (41 N. E. Rep. 1113). Under Ia. Code, § 1894, requiring service of notice of the expiration of the time for redemption upon the person in possession of the land, and upon the person in whose name the same is taxed, it is held that serving the notice on the husband where the title is held in the wife’s name is not sufficient. *Medland v. Walker*, Ia. (64 N. W. Rep. 797). A statute (Minn. Gen. Stat. 1894, § 1654) requiring the service of notice of the expiration of the time for redemption on the person in whose name the

land is assessed, which notice shall specify the time when the redemption will expire, and provides that the time shall be sixty days after the service of such notice, is not complied with by the service of a notice on July 12, 1888, which stated that the time for redemption would expire "on the ninth day of September, 1888, or within sixty days after the service of this notice." *Peterson v. P. P. Mast. & Co.*, 61 Minn. 118 (63 N. W. Rep. 168). In a later case construing this section it is held that a notice to the effect that the period of redemption from a tax sale will expire "sixty days after the service of the notice in the manner prescribed by statute," is insufficient; and the statute applies although the name of the owner is stated in the assessment book as unknown, and there is no person in the actual possession of the premises. In such a case notice to the unknown owner must be made by publication. *State v. Halden*, 62 Minn. 246 (64 N. W. Rep. 568). In New York it is held that where, at the time fixed for giving the notice of redemption, the land is in possession of one who has erected a house thereon and is occupying it as a home, the notice should be served on him. *People v. Wemple*, 144 N. Y. 478 (89 N. E. Rep. 397); but one who has occasionally entered upon uncultivated and uninclosed land for the purpose of sowing grass seed and removing grass therefrom is not such an occupant as is entitled to notice to redeem. *People v. Turner*, 145 N. Y. 451 (40 N. E. Rep. 400).

Sec. 816. Tax deeds. The certificate of acknowledgment to a tax deed, in the absence of some special statute to the contrary, should conform to the general statutory form of acknowledgments. Ala. Code, §§ 592, 1802, applied. *Jackson v. Kirksey*, Ala. (18 So. Rep. 804). Where a statute requires a deed executed to an assignee of a certificate of purchase to recite that such certificate was assigned by the purchaser "by his indorsement under his hand, written on the back of the certificate," and dated, a recital which does not show that the assignment was made on the back of the certificate, or under the hand of the assignor, and not dated, is insufficient. *Atkinson v. Butler Imp. Co.*, 125 Mo. 565 (28 S. W. Rep. 861). Under the statute of 1887 (§ 57, c. 3681, Laws Fla.) it is permissible for the clerk of the circuit court to include in

one tax deed different pieces or parcels of land which belonged to different owners and are included in different certificates, where all of such pieces or parcels are bought at the same tax sale by the same purchaser, and the same were singly and separately sold, and not sold for a gross or lumping sum, and the deed describes each tract separately, and states the price for which each was sold. *Stieff v. Hartwell*, 85 Fla. 606 (17 So. Rep. 899); to the same effect is the case of *State v. Jordan*, 86 Fla. 1 (17 So. Rep. 742). Under N. C. Laws 1891, Ch. 826, § 66, which provides that the sheriff shall make a deed to the purchaser at any time "within one year after the expiration of one year from the date of sale of any real estate for taxes," it is held that where the sale was made on May 3, 1892, a deed made on May 3, 1893, was void as being within the year, inasmuch as Code § 596 provides that in computing time within which an act is to be done the first day shall be excluded and the last day included. *Burgess v. Burgess*, 117 N. C. 447 (23 S. E. Rep. 836). In construing the statutes of California it is held that where the state purchases at a tax sale the controller and the attorney general have no authority to serve the notice of the intention of the purchaser to apply for a deed as required by Pol. Code § 3785. *Van Fleet and Garoutte, JJ., dissenting. San Francisco & F. L. Co. v. Banbury*, 106 Cal. 129 (39 Pac. Rep. 439). Under the present Revenue law of Nebraska a valid tax deed cannot be executed for the reason that the statutes make no provision for an official seal for a county treasurer, the officer required to execute the deed. *Alexander v. Thacker*, 43 Neb. 494 (61 N. W. Rep. 738); *McCauley v. Ohenstein*, 44 Neb. 89 (62 N. W. Rep. 232); *Dickey v. Paterson*, 45 Neb. 848 (64 N. W. Rep. 244). Where there is a material variance between the description of the land in a tax deed and the description given to it in the assessment roll and in the collector's advertisement of it for tax sale and in his certificate of tax sale and purchase, such tax deed is void. Where several tracts or parcels of land are assessed and sold for taxes, and the amount of taxes assessed upon each of said tracts is not set down or given opposite thereto, respectively, in the assessment roll and in the collector's advertisement of sale, but the aggregated taxes assessed on all the different tracts is given

only, a tax deed predicated thereon is void. *Levy v. Ladd*, 35 Fla. 391 (17 So. Rep. 635). Neb. Comp. Stat., Ch. 77, §§ 123, 128, construed and applied—duties and obligations of county treasurer with reference to the execution of tax deeds. *Burnham v. Farmers' L. & T. Co.*, 44 Neb. 438 (63 N. W. Rep. 45). Fla. Acts 1891, Ch. 4011, applied—issuance of tax deed. *State v. Bradshaw*, 35 Fla. 313 (17 So. Rep. 642). Mass. Pub. Stat., Ch. 12, § 38, construed and applied—sufficiency of recitals as to cause of sale. *Pixley v. Pixley*, 164 Mass. 335 (41 N. E. Rep. 648). Mo. Laws 1872, § 224, p. 130, applied—recital in tax deed to a purchaser of land forfeited to the state for taxes. *Atkinson v. Butler Imp. Co.*, 125 Mo. 565 (28 S. W. Rep. 861).

Sec. 817. Tax deeds—Conclusiveness of as evidence of title. A city may, by a proper provision in its charter, make a tax deed executed by its officers *prima facie* evidence of the regularity of the proceedings leading to its execution. *Howe v. Barto*, 12 Wash. St. 627 (41 Pac. Rep. 908). A statute (Cal. Pol. Code, §§ 3786, 3787) making a tax deed *prima facie* evidence of the pre-existence of certain facts was held not to extend to a tax deed made by a city to the extent of creating the presumption that such city had provided by ordinance for a system for the collection of its tax, as required by law. Act March 13, 1883, applied. *Carpenter v. Shimmers*, 108 Cal. 359 (41 Pac. Rep. 473). In construing Wash. Code, §§ 2936, 2937, which make the recitals in a tax deed conclusive evidence of the regularity of the proceedings upon which it is based, it is held that after tender and application to redeem the holder of the invalid tax deed cannot avail himself of the benefit of this statute by taking out another deed regular in form. *Vestel v. Morris*, 11 Wash. St. 451 (39 Pac. Rep. 960). A recital in a tax deed to the effect that a sale was made on a certain day, on which date the officer had no authority to sell, does not preclude the showing of the fact that the sale was made on a different day and at the proper time. *Knowles v. Martin*, 20 Colo. 393 (38 Pac. Rep. 467). How. Mich. Stat., Volume 3, § 1170g6, providing that a tax deed "shall convey an absolute title to the land sold, and be conclusive evidence of title in fee in the grantee," applied to

a particular state of facts. *McKinnon v. Meston*, 104 Mich. 642 (62 N. W. Rep. 1014).

Sec. 818. Judicial proceedings to collect taxes. A suit to collect taxes must be brought in a county in which the land is situated. *State v. Baker*, 129 Mo. 482 (81 S. W. Rep. 924). The initials of the given name of a delinquent taxpayer are a sufficient description of him in a published notice to sustain a judgment by default in a tax suit against collateral attack. *Mosely v. Reily*, 126 Mo. 124 (28 S. W. Rep. 895; 26 L. R. A. 721). A judgment for taxes against "Jeff M. Thompson," and a sale thereunder, is sufficient to give the purchaser title to land entered in the name of "M. Jeff Thompson." *Nolan v. Taylor*, 181 Mo. 224 (32 S. W. Rep. 1144). A judgment for taxes which have been already paid is not void so as to entitle the owner of the land sold thereunder to set aside the sale on motion made before the return of the execution. *State v. Boyd*, 128 Mo. 180 (30 S. W. Rep. 513). Where in a proceedings under Elliott's Supp. Ind. Stat., § 2147, and § 6492, Ind. Rev. Stat. 1881, to enforce by judgment and execution sale the payment of taxes on lands remaining unsold for three years, the land is not sold for a sufficient sum to pay all the taxes due, the paramount lien given the state for taxes by Ind. Rev. Stat., §§ 6446, 6447, extends to such balance, and such lien is not merged in the judgment rendered, but may be enforced against other property of the debtor or against the same land sold when the same has been acquired by him. *Beard v. Allen*, 141 Ind. 243 (39 N. E. Rep. 665; 40 N. E. Rep. 654). Although proceedings in enforcement of unpaid taxes may be regular, and vest a legal title in the purchaser at the tax sale made thereunder, an actual and real possession of the property does not instantly follow as the direct result of the adjudication. The fictitious legal seisin, which the law makes the accompaniment of a completed act of sale, would flow from such an adjudication; but the adjudication, though it would give rise to "a right to possession," would not operate of itself as an actual and real corporeal possession of the property. The state does not occupy, in this respect, a position different from that of any other adjudicatee. *Handlin v. H. Weston Lumber Co.*, 47

La. 401 (16 So. Rep. 955). Cal. Pol. Code, §§ 8668-8670, construed and applied—collection of delinquent taxes assessed against a railroad. *People v. Central Pac. R. Co.*, 105 Cal. 576 (88 Pac. Rep. 905). How. Mich. Stat., §§ 1170f4, 1170i4, applied—tax judgment—notice of application—proof of publication. *Benedict v. Auditor General*, 104 Mich. 269 (62 N. W. Rep. 864). Minn. Gen. Stat. 1894, §§ 1579, 1586, 1631, construed and applied—proceeding to enforce delinquent tax. *In re Taxes in Hennepin Co. v. Baldwin*, 62 Minn. 518 (65 N. W. Rep. 80). An execution sale made under a judgment obtained for delinquent taxes, under Mo. Rev. Stat. 1889, § 7683, may be set aside for failure to sell in parcels. *Corrigan v. Schmidt*, 126 Mo. 804 (28 S. W. Rep. 874).

Sec. 819. Judicial proceedings to confirm and enforce tax titles. Where in an action to quiet a tax title the complainant alleges facts making a *prima facie* valid title, the defendant must specially plead facts tending to defeat the tax sale. *Wagar v. Bowley*, 104 Mich. 38 (62 N. W. Rep. 293). A decree to confirm a tax title rendered upon service of notice by mail is not void because the notice mailed was not delivered by the postal authorities, but returned to the sender. Miss. Code 1880, §§ 1859, 1860, applied. *Davis v. Cass*, 72 Miss. 985 (18 So. Rep. 454). La. Acts 1888, No. 80, provides a statutory remedy for placing adjudicatees at tax sales in possession of the property purchased. *Handlin v. H. Weston Lumber Co.*, 47 La. 401 (16 So. Rep. 955). Where a purchaser applies for a writ of assistance, as allowed by the statute of Michigan, the person whose land was sold may file a petition in such proceeding to have the sale set aside. *Fenkinson v. Auditor General*, 104 Mich. 34 (62 N. W. Rep. 163).

Sec. 820. Actions to recover lands sold for taxes—Statute of limitations. In construing Mansf. Ark. Dig., § 4475 (Sand. & H. Dig., § 4819), which provides that no action for the recovery of land from one holding under a tax sale “shall be maintained, unless it appear that the plaintiff, his ancestor, predecessor or grantor, was seised or possessed of the lands within two years, next before the commencement of such suit or action,” it is held that adverse possession for the required time by the holder of a tax title is a complete bar to such action

though such title is void on its face. *Woolfork v. Buckner*, 60 Ark. 163 (29 S. W. Rep. 872). The court say: "In discussing this statute in *Gates v. Kelsey*, 57 Ark. 526 (22 S. W. Rep. 162), this court said, through Judge Battle: 'In the states where the statutes of limitations require actions to be brought within a certain time after a particular act, as the day of sale or record, the statutes are generally held to commence running, if they have any effect, according to their words. *Kessinger v. Wilson*, 58 Ark. 406, 410 (14 S. W. Rep. 96; 22 Am. Rep. 220). Under all other statutes the period of limitation begins at the time the cause of action accrues, and as to land it does not accrue until there is an adverse possession. The rightful owner is deemed to be in possession until he is ousted or disseised. Possession follows the title, in the absence of any actual possession adverse to it. *Ringo v. Woodruff*, 43 Ark. 485; *Bradley v. West*, 60 Mo. 40; *Clarke's Lessee v. Courtney*, 5 Pet. 819; *Peyton v. Smith*, Id., 493; *Barrett v. Love*, 48 Iowa 115.' Referring to the statute, the opinion proceeds: 'No date—as the day of sale or record—is specified from which it must run. There is only one fact mentioned in it which can defeat the recovery of land illegally sold for taxes, and that is the fact that the plaintiff, his ancestor, predecessor, or grantor, was not seised or possessed of the lands in question within two years next before the commencement of such suit of action. The statute necessarily implies that, if he was seised or possessed within the two years, he can recover. In other words, it makes the disseisure and dispossession of the true owner for two consecutive years a bar. It is only the fact, under the statute, which can defeat him in an action to recover. There is nothing in the statute which constitutes any act a disseisure. The general rule governs, and possession follows the title. There is only one way in which he can be disseised and dispossessed by an illegal sale for taxes, and that is by adverse possession. Two years' adverse possession is, therefore, necessary to constitute a bar under the two years statute.' It will be perceived that it follows from this case that it is the two years' adverse possession only under a purchase of lands sold for taxes that bars the action for recovery, and that the statute begins to run from the time when there is a disseisure and dispossession of the

true owner, which, of course, cannot commence until the period for redemption expires; and that the bar of the statute was complete if two years elapsed before suit, whether the tax deeds under which the lands were claimed were void upon their faces or not, and we so hold." Particular facts held insufficient to show two years adverse possession required by this statute. *Richards v. Howell*, 60 Ark. 215 (29 S. W. Rep. 461). Mills' Colo. Stat., § 8904, limiting actions for the recovery of land sold for taxes to five years after the execution and delivery of the tax deed, is held not to apply to any action by the purchaser at a tax sale, but only to an action by the prior owner, whose title is sought to be divested by the tax sale. *Sullivan v. Collins*, 20 Colo. 528 (39 Pac. Rep. 834). Ia. Code, § 902, applied — limitation of action to recover land sold for taxes. *Rath v. Martin*, Ia. (61 N. W. Rep. 941). The statute of Kansas limiting actions to recover property sold for taxes to five years from the recording of the tax deed is held to apply to infants, and is not affected by § 17, Code Civ. Proc., authorizing the bringing of actions to recover real property by persons under disability within two years after the removal of such disability. *Goodman v. Wilson*, 54 Kan. 709 (39 Pac. Rep. 704). Kan. Gen. Stat. 1889, Ch. 107, applied — limitation of actions to recover land held under a tax title. *Douglass v. Lowell*, 55 Kan. 574 (40 Pac. Rep. 917). Under Miss. Code 1880, § 539, a purchaser at a tax sale, although it be defective, who occupies the land adversely for three years, holding under his tax deed, has a perfect title. *Brougher v. Stone*, 72 Miss. 647 (17 So. Rep. 509). Miss. Code 1871, § 1709, requiring suits to invalidate tax titles to be brought within three years from the time of the sale, has no application where no title was derived from the sale. *Zingerling v. Henderson*, Miss. (18 So. Rep. 432).

Sec. 821. Miscellaneous notes and construction of miscellaneous statutes. Submerged lands lying between a levee and the river were held subject to taxation on the ground that the riparian owner was deriving revenue therefrom. *Mathis v. Bd. of Assessors*, 46 La. 1570 (16 So. Rep. 454). In construing a statute, Fla. Laws 1887, Ch. 3681, § 47, which requires that "a copy of the advertisement shall be recorded

in the county clerk's office within ten days after said sale," it is held that the statute is complied with where it appears that such record was made thirteen days before the day of sale. *Stieff v. Hartwell*, 85 Fla. 606 (17 So. Rep. 899). Ga. Act 1874, p. 105, Act 1875, p. 119, applied—sale by comptroller general. *Bedgood v. McLane*, 94 Ga. 283 (21 S. E. Rep. 529). Under La. Const., Art. 210, and Act 1888, No. 85, an assessment against the owner, and notice to him, is requisite to pass title by a tax sale. *Font v. Gulf St. L. & Imp. Co.*, 47 La. 272 (16 So. Rep. 828). La. Act No. 82, of 1884, construed and applied—sale for taxes. *Henderson v. Ellerman*, 47 La. 306 (16 So. Rep. 821); *Remick v. Lang*, 47 La. 914 (17 So. Rep. 461); *Blood v. Negrotto*, 47 La. 1132 (17 So. Rep. 596). Louisiana Acts 1880, No. 107, applied. *Dencgre v. Buchanan*, 47 La. 1559 (18 So. Rep. 501). Mich. Pub. Acts 1889, No. 195, § 71, Pub. Acts 1885, § 104, construed and applied—sale of lands bid in by the state—rights of purchaser at such sale when set aside. *Auditor General v. Board of Sup'rs*, Mich. (64 N. W. Rep. 570). Miss. Code 1880, §§ 597–698, applied—assessment and taxation of railroads. *Le Blanc v. Illinois Cent. R. Co.*, 72 Miss. 669 (18 So. Rep. 881). Noncompliance with § 3815, Miss. Code 1892, requiring the officer to file a list of lands struck off to the state, invalidates the sale. *Zingerling v. Henderson*, Miss. (18 So. Rep. 432). An application to have the comptroller cancel a tax sale, under N. Y. Laws 1893, Ch. 711, § 20, cannot be made by the owner of the land. *People v. Roberts*, 144 N. Y. 234 (39 N. E. Rep. 85). N. Y. Laws 1892, Ch. 686, § 16, applied—cancellation of erroneous taxes by county court. *Buffalo Mut. Gaslight Co. v. Board of Sup'rs*, 144 N. Y. 228 (39 N. E. Rep. 86). The statutes of Virginia forfeiting land for nonpayment of taxes are constitutional, and, in order to consummate a forfeiture in such a case, no judgment or decree or other matter of record is necessary; the statute *a proprio vigore* effectually divests title out of the defaulting owner, and perfectly vests it in the commonwealth. *Lennig's Ex'rs v. White*, Va. (20 S. E. Rep. 831).

TENANTS IN COMMON.

EPITOME OF CASES.

Sec. 822. Creation of an estate in common. A devise of a body of land to four sons to be divided into four parts, "share and share alike," although it does not designate the part to be taken by each so that a surveyor can locate the several parts, creates in the devisees an estate in common. *Midgett v. Midgett*, 117 N. C. 8 (28 S. E. Rep. 87). A conveyance to two daughters, subject to the homestead rights of their mother, which contained a provision that if either of the grantees should die before the mother the survivor should take the whole, was held to create an estate in common under Mass. Pub. Stat. Ch. 126, § 5, and that the proviso as to survivorship took effect by way of a shifting use. *Leonard v. Southworth*, 164 Mass. 52 (41 N. E. Rep. 126). In construing Miss. Code 1892, § 2441, which provides that "all conveyances of lands made to two or more persons shall be construed to create estates in common, and not in joint tenancy, unless it shall manifestly appear from the tenor of the instrument that it was intended to create an estate in joint tenancy, with the right to the survivor or survivors; provided this provision shall not apply to mortgages or conveyances made in trust," it is held that a conveyance of land to three persons "during their natural lives, and at their death to the descendents of their bodies in fee, if any may have, but, if they have none to survive them, then, in that event, to the heirs of their brothers and sisters in fee," creates a tenancy in common, the estate of each tenant at her death passing to her heirs until the last tenant dies, when the ulterior limitation will take effect. *Whitfield, J.*, dissenting. *Hawkins v. Hawkins*, 72 Miss. 749 (18 So. Rep. 479).

Sec. 823. Conveyance by one cotenant. In Texas it is held that the deed of a tenant in common to a specific

parcel of the land is good between parties, and is only voidable by the other cotenants in so far as it affects their rights. *Maverick v. Burney*, 88 Tex. 560 (82 S. W. Rep. 512). A mortgage by one cotenant of the entire premises for money used in making improvement thereon will bind the mortgagor's interest and pass to his mortgagee all the mortgagor's right to charge his cotenant's interest with its proportionate share of the increase in value caused by the improvements. *Salem Natl. Bk. v. White*, 159 Ill. 136 (42 N. E. Rep. 312).

Sec. 824. Trust relations—Buying in titles, etc. The general rule that a cotenant's purchase of an outstanding title inures to the benefit of all does not apply where the original interests of such cotenants were acquired under different instruments, from different sources, and at different times. *Stevens v. Reynolds*, 148 Ind. 467 (41 N. E. Rep. 931). The court quote approvingly from Freeman on Cotenancy, § 155, as follows: "As the rule forbidding the acquisition of adverse titles by a cotenant from being asserted against his companions is always said to be based upon considerations of mutual trust and confidence supposed to be existing between the parties, the question naturally arises whether the rule is applicable where the reasons on which it is based are absent. Joint tenants, tenants by entirety, and coparceners always hold by and under the same title. Their union of interest and of title is so complete that beyond all doubt such a relation of trust and confidence unavoidably results therefrom that neither will be permitted to act in hostility to the interests of the other in reference to the joint estate. Tenants in common, on the other hand, may claim under separate conveyances, and through different grantors. Their only unity is that of right to the possession of the common subject of ownership. As their connection is not necessarily so intimate as that of other cotenants, it may well be doubted whether they should always be subject to the restraints imposed upon the others. There are many cases in which the rule in regard to the acquisition of an adverse title by a cotenant is spoken of in general terms as applying to tenants in common, irrespective of their special and actual relations to one another. But an examination of

the decisions clearly shows that tenants in common are necessarily prohibited from asserting an adverse title. If their interests accrue at different times, and under different instruments, and neither has superior means of information respecting the state of the title, then either, unless he employs his cotenancy to secure an advantage, may acquire and assert a superior outstanding title, especially where the cotenants are not in joint possession of the premises,"—citing, *Roberts v. Thorn*, 25 Tex. 736 (78 Am. Dec. 552); *Frentz v. Klotsch*, 28 Wis. 317; *Wright v. Sperry*, 21 Wis. 331; *Brittin v. Handy*, 20 Ark. 381 (78 Am. Dec. 497); *Matthews v. Bliss*, 22 Pick. 48; *Rippeto v. Dwyer*, 49 Tex. 498; *King v. Rowan*, 10 Heisk. 682.

A cotenant who discharges a mortgage may have contribution from his cotenants but he cannot be subrogated to the lien of such mortgage. *Leach v. Hall*, Ia. (64 N. W. Rep. 790). Where tenants in common execute a trust deed of their land, under which the trustee mortgages and sells an undivided interest therein, a purchase from the trustee's grantee of such interest by one of the cotenants does not inure to the benefit of the others. *Watson v. Edwards*, 105 Cal. 0 (38 Pac. Rep. 527). The purchase of a life estate to which the interest of one cotenant is subject by another cotenant does not extinguish the life estate nor does such purchase inure to the benefit of all the cotenants. *McLaughlin v. McLaughlin*, 80 Md. 115 (30 Atl. Rep. 607). Though tenants in common acquired their interests in such a manner as to create a fiduciary relation between them, the purchase of an outstanding claim by one is not void as to his cotenants, nor does such interest vest, by operation of law, in the latter; his right to share in the benefits of the purchase being dependent on his having elected, within a reasonable time, to bear his portion of the expense necessarily incurred in the acquisition of the claim. *Stevens v. Reynolds*, 143 Ind. 467 (41 N. E. Rep. 931).

Sec. 825. Ouster—Rents. One tenant in common is not liable to his cotenants for rent for the use of the common property without proof of an actual ouster. *McLaughlin v. McLaughlin*, 80 Md. 115 (30 Atl. Rep. 607). The possession

of one cotenant is presumed to be with the consent of his cotenants, and mere possession will not constitute an ouster. *Milbourn v. David*, 7 Houst. (Del.) 209 (30 Atl. Rep. 971). The mere receipt of profits and payment of taxes by one cotenant does not operate as an ouster of the other cotenants. *Lagoria v. Dozier*, 91 Va. 492 (22 S. E. Rep. 239). The execution of a mortgage by one cotenant upon the premises does not operate as a disseisin of the others. *Leach v. Hall*, Ia. (64 N. W. Rep. 790). By common law, one joint tenant, tenant in common, or parcener using the common land exclusively, but not ousting or excluding his co-owners, is not chargeable to them for use and occupation; but this rule has been changed by § 14, Ch. 100, W. Va. Code, as to joint tenants and tenants in common, but not as to parceners. A coparcener merely from sole occupation of premises, is not chargeable in favor of coparceners, unless he excludes them. Where it is proper to allow a coparcener for improvements a charge for use and occupation may be set off against the improvements. *Ward v. Ward's Heirs*, 40 W. Va. 611 (21 S. E. Rep. 746; 29 L. R. A. 449). Rents and profits may be recovered in an action of ejectment against one cotenant by another. *Snell v. Harrison*, Mo. (32 S. W. Rep. 87). Under Ill. Rev. Stat., Ch. 2, § 1, a tenant in common, who takes and uses the profits or benefits of the estate in greater proportion than his interest must account therefor to his cotenants. *McParland v. Larkin*, 155 Ill. 84 (39 N. E. Rep. 609).

Sec. 826. Miscellaneous notes. One cotenant may recover possession of the whole property as against a mere possessor without title. *Mays v. Withowski*, 46 La. 1475 (16 So. Rep. 478). Where several cotenants join with their cotenant in the mortgage of the common estate to secure his individual debt they may join in an action against him to be reimbursed for loss occasioned by the foreclosure of such mortgage. *McGill v. McGill*, 172 Pa. 100 (33 Atl. Rep. 146). Cotenants, who commit waste, are liable to each other jointly or severally for the damages; but the amount of recovery against a stranger or a grantee of a cotenant must be apportioned to correspond with his undivided interest in the land.

McDodrill v. Pardee & Curtin L. Co., 40 W. Va. 564 (21 S. E. Rep. 878).

TREES.

EPITOME OF CASES.

Sec. 827. Growing trees. Growing trees constitute a part of the realty upon which they stand and a sale thereof is to be treated as a sale of an interest in land. *Stuart v. Pennis*, 91 Va. 688 (22 S. E. Rep. 509). The court say: "There is scarcely any other subject upon which there is so great diversity of judicial decision. Whenever required to pronounce upon a contract for their sale, courts have seemed uncertain as to whether standing or growing trees should be classed as real or personal property. Not only have the courts of different jurisdictions decided differently, but the decisions of the same court within the same jurisdiction have not always been uniform. Particularly has this been the case with the courts of England, and their latest declaration on this subject, *Marshall v. Green*, 1 C. P. Div. 35, has not escaped criticism from very high authority. *Hirth v. Graham*, 50 O. St. 57 (33 N. E. Rep. 90; 40 Am. St. Rep. 641); Benj. Sales (Ed. 1892), § 126, and article by Prof. Washburn (the learned author of the work on real property) published in the Albany Journal, and to be found in the note to the case of *Purner v. Piercy*, 40 Md. 212 (17 Am. Rep. 595). The decisions of the highest courts in the several states of the Union have also been greatly at variance with respect to the subject. It will be found, however, upon an examination of them, that the weight of authority preponderates in favor of the view that a contract for the sale of growing trees is a contract for the sale of an interest in land, and is to be so treated. *Hirth v. Graham*, *supra*; *Owens v. Lewis*, 46 Ind. 488 (15 Am. Rep. 295); *Green v. Armstrong*, 1 Denio 550; *Slocum v. Seymour*, 36 N. J. L. 138 (13 Am. Rep. 432); *Kingsley v. Holbrook*, 45 N. H. 313 (86 Am. Dec. 173); *Buck v. Pickwell*, 27 Vt. 157;

Harrell v. Miller, 85 Miss. 700 (72 Am. Dec. 154); Bish. Cont., § 1294; and Washb. Real Prop., 866, 867. Land includes everything belonging or attached to it, above and below the surface. It includes the minerals buried in its depths, or which crop out of its surface. It equally includes the woods and trees growing upon it. Rooted and standing in the soil, and drawing their support from it, they are regarded as an integral part of the land, just as the coal, the iron, the gypsum, and the building stone which enter so largely into the business of commerce. Attached to the soil, they pass with the land, as a part of it. A conveyance of the land carries with it to the grantee the right to the forests and trees growing upon it. In the dealings of men, growing timber is ever regarded as a part of the realty. Upon the death of an ancestor they pass with it to his devisee, or descend with it to his heir, and not to his executor or administrator. They are not treated as personalty. They are not subject to levy and sale under execution. And so, upon principle, sound reason, and authority, we are of opinion that they constitute an interest in, or a part of, the land, and must be so treated by the courts. We are the better satisfied with the conclusion reached in that it has the merit of being easily understood and readily applied, not only to this particular industry, but to the many other useful, varied, and boundless natural products of a similar kind, of the section of the state whence this case comes, in whose development its people are becoming more largely engaged year by year."

Sec. 828. Trees growing on boundary line—Title and rights of adjoining owners. Trees which stand wholly within the boundary line of one's land belong to him, although their roots and branches may extend into the adjacent owner's land, but the adjacent owner may lop off the branches or roots of such trees up to the line of his land. If the tree stand so nearly upon the dividing line between the lands that portions of its body extend into each, the same is the property in common of the landowners. And neither of them is at liberty to cut the tree without the consent of the other, nor to cut away the part which extends into his land, if he thereby injures the common property in the tree. *Robinson v. Clapp*, 65 Conn.

865 (32 Atl. Rep. 939; 29 L. R. A. 582). For case with notes see Ballards' Annual, Vol. 3, §§ 745-747.

Sec. 829. Miscellaneous notes. Where standing timber is sold and the time is agreed upon in which it is to be removed and it is not removed within that time, the purchaser loses his right to enter upon the land and remove it. *Morgan v. Perkins*, 94 Ga. 353 (21 S. E. Rep. 574). A deed conveying to the grantee the "saw timber" on certain land is a conveyance of real estate; and where the grantor subsequently conveys the land to a third person, reserving the timber, such subsequent grantee cannot claim the timber on the ground that it was not removed within a reasonable time from the execution of the deed by which it was conveyed. *Magnetic Ore Co. v. Marbury L. Co.*, 104 Ala. 465 (16 So. Rep. 632). Where a contract for the sale of timber provides that a purchaser shall have the right "for his train, tramroad, wagons and employes to enter on said land and remove said timber," it is held that he may build a road sufficient for the passage of a railroad train, but it did not grant to the purchaser of the timber any right to cut cross ties off of the right of way or to destroy fences or ditches. *Waters v. Greenleaf Johnson L. Co.*, 115 N. C. 648 (20 S. E. Rep. 718).

TRESPASS.

EPITOME OF CASES.

Sec. 830. As to when the action will lie. An action for trespass will not lie for acts committed by one while lawfully in possession as tenant of the owner. *Toles v. Meddaugh*, Mich. (64 N. W. Rep. 329). One who reclaims his own property without committing a breach of the peace, cannot be held to be a trespasser. *Vial v. Hofen*, Mich. (64 N. W. Rep. 11). A telegraph company is liable for the wrongful cutting of timber by its servants while engaged in the opening of a right of way through the land of another,

although done in violation of orders. *Postal Tel. Cable Co., v. Brantley*, 107 Ala. 688 (18 So. Rep. 821). In New Jersey it is held that a tenant holding over after the termination of his lease who is forcibly evicted by his landlord may maintain an action for trespass. *Theil v. Bulls Ferry Land Co.*

N. J. L. (33 Atl. Rep. 281). The statute authorizing trespass to be maintained by the owner of the land, does not apply to one who simply owns the timber upon the land, the surface title remaining in another. *Clifton Iron Co. v. Curry*, Ala. (18 So. Rep. 554). Ga. Code, § 4077, provides a remedy for the expulsion of tenants holding without right, and in construing this statute it is held that a landlord who, without such process, forcibly and violently ejects a tenant and his personal goods from the rented premises, is liable to the latter in an action for trespass, although the tenant was holding over beyond his term, was in arrears for rent, and had received legal notice to quit. *Entelman v. Hagood*, 95 Ga. 390 (22 S. E. Rep. 545). Trespass is not the proper remedy for one whose land, acquired by deed without reservation, is occupied by the spur track of a railroad company, under a parol arrangement with plaintiff's grantor, of which plaintiff knew before purchasing, though he has demanded that the track be removed, defendant having entered lawfully into possession when it was laid. *Scarvell v. Grand Rapids & I. R. Co.*, 103 Mich. 373 (61 N. W. Rep. 534; 28 L. R. A. 519). One who owns land on either side of a strip used as a private way cannot require that a gate be maintained at its termination where it connects with the highway. *Rowe v. Nally*, 81 Md. 367 (32 Atl. Rep. 198).

Sec. 831. Cutting timber to avert peril. A railway company cannot justify its trespass in cutting timber on the land of another, by showing that such timber stood close to the right of way and was liable to fall upon passing trains. *Toledo, St. L. & K. C. R. Co. v. Loop*, 139 Ind. 542 (39 N. E. Rep. 306). The court say: "All peril may not be averted. It is the immediate and probable, not the remote and barely possible, that we are called upon to guard against. The tree along the roadside may grow on from year to year, increasing in strength, even into the centuries; yet a hurricane

may rise within an hour, and overturn the stalwart oak upon the passing traveler. It is not, however, such merely possible injury, but an imminent and probable danger, that one may seek to avoid by entering unbidden upon the land of another. As for trees that grow so close to the line that their branches extend over the adjoining premises, there is no doubt that, if injury is shown, the adjoining owner may have his action in damages, or he may cut off the overhanging branches so far as they extend above his soil. He may not, though, cross his neighbor's line, and cut down the trees."

Sec. 832. Parties, pleading and practice—Equitable remedy. Where a husband and wife occupy premises as tenants, he as the head of the family is the proper person to maintain an action for trespass on the premises. *Hart v. Hicks*, 129 Mo. 99 (81 S. W. Rep. 851). One without title in possession of a platted town site may maintain trespass against a naked trespasser without claim or color of title. *Sell v. Graves*, 16 Mont. 842 (40 Pac. Rep. 788). In an action for trespass to realty the complaint should describe the premises. *McDodrill v. Pardee & Curtin L. Co.*, 40 W. Va. 564 (21 S. E. Rep. 878). Where one seeks to defend an action for trespass by a plea that he holds possession under a lease he must allege under whom such lease is claimed. *Purdue v. Caswell Creek Coal & C. Co.*, 40 W. Va. 372 (21 S. E. Rep. 870). Either possession or title at the time of the commission of the trespass is essential to the maintenance of an action therefor. *Yellow River R. Co. v. Harris*, 35 Fla. 385 (17 So. Rep. 568). Under Mich. How. St., § 8964, subd. 2, it is held that in an action of trespass *quare clausum*, the general denial does not put in issue the title so as to govern the rendition of a judgment for costs. *Ostrom v. Potter*, 104 Mich. 115 (62 N. W. Rep. 170). Possession of land abutting on a highway is sufficient title to maintain an action of trespass for cutting grass upon the abutting portion of such highway; and it is no defense to such action to show title to the land in a third person unless the trespasser can justify his acts by authority from such person. *Stevens v. Gordon*, 87 Me. 564 (38 Atl. Rep. 27). Where the defendant's claim rests simply upon a warranty deed calling for a given number of

acres, while the *locus in quo* has an adjoining parcel, and, if included, would make up the deficit, he does not have even a color of title, it appearing that such adjoining parcel was not owned by his grantors. *Dubuque v. Coman*, 64 Conn. 475 (30 Atl. Rep. 777). A suit in equity will lie to restrain a continuing trespass on a mining claim by the removal of valuable ore, and for damages already done by such trespass, where the title to the property is seriously in doubt, though the question of title has not been presented in a court of law. *Bishop v. Baisley*, 28 Ore. 119 (41 Pac. Rep. 986). See opinion for extended discussion of this subject.

Sec. 833. Measure of damages. In the absence of fraud, malice, oppression, or other special aggravation only compensatory damages can be given. *Fishburne v. Engle-dove*, 91 Va. 548 (22 S. E. Rep. 354). In an action of trespass against the lessor for keeping the lessee out of possession, the measure of damages is the fair, average value of the use of the land, less the rent; and evidence of the probable value of a future crop which the lessee intended to raise is inadmissible. *Taylor v. Cooper*, 104 Mich. 72 (62 N. W. Rep. 157). Under the Mich. How. Stat., § 8306, it is held that the fact that one who continues to occupy premises after a judgment of ouster and notice to quit, does so in the belief that he has a lawful right, is no bar to the recovery against him of triple damages in an action of trespass. *Lane v. Ruhl*, 103 Mich. 38 (61 N. W. Rep. 847). Particular fact cases as to the measure of damages in an action of trespass for cutting timber. *Gustin v. Jose*, 11 Wash. St. 348 (39 Pac. Rep. 687).

Sec. 834. Measure of damages—Cost of repair—Shrinkage in value. In a recent case the supreme court of Michigan say: "The law aims to compensate parties for injuries, and ordinarily the rule that makes the injured party whole is a safe rule to adopt; but it is not invariably so, for such person owes some duty to a trespasser. In the majority of cases little difficulty is experienced, because the trespass is clearly injurious, and the cost of repair, where feasible, and the shrinkage in value, where it is not, furnish fair measures of damage. In a case where rebuilding is a physical impossibility there is no alternative but to apply the latter rule; and,

on the other hand, where it is possible, there is perhaps no good reason why a plaintiff should not recover the reasonable cost thereof incurred in good faith; and under the rules laid down in *Allison v. Chandler*, 11 Mich. 542, perhaps the court should not be too reluctant to apply this rule, though it should bear heavily upon the defendant. But there are limits to its application. While it would be plainly absurd to deny to a plaintiff, by way of damage for the destruction of a few rods of fence, the expense actually incurred, or perhaps the prospective cost of rebuilding the same, upon the ground that his measure of damages should be the shrinkage in value of a thousand acres of land owing to such destruction, it would be as unjust to say that he should be entitled to recover the amount necessary to replace his farm, which had sunk into defendant's mine, where the filling of the hole caused thereby, though a physical possibility, would necessarily be attained by an expenditure of an amount many times the value of the farm in its former condition. In such case the value of the premises would be the measure of the damages. Another illustration of a case where this rule must apply is where an injury to the foundation of a building is caused by a trespass, to put which back in its former condition might require the tearing down and rebuilding of a valuable edifice. It would be unjust to require this, where the injury was not such as to endanger the building, and where it was trifling in comparison to the cost of remedying the defect. Still more palpable would be the injustice of allowing a plaintiff to recover from a defendant the amount necessary to remove a valuable building, erected by him upon plaintiff's land, thereby greatly enhancing its value, which had thereby become the property of the plaintiff, and which he might thereafter remove or not at his own will. Undoubtedly, within certain bounds, a plaintiff might remove such a structure, and collect the cost thereof as damages, if he saw fit to do so before action brought, because the law recognizes his right to use his land as he may choose. Without undertaking to determine where limitations upon such rights begin, we are impressed with the injustice of allowing a plaintiff in a trespass case to recover the prospective cost of removing a structure or other improvement, and to afterwards avail

himself of the benefit of his property by retaining it." *Burtraw v. Clark*, 103 Mich. 383 (61 N. W. Rep. 552).

Sec. 835. Measure of damages for trespass — Wrongful taking of coal. In a recent case to recover damages for the wrongful taking of coal from the land of another, it is held that if the trespass was committed by mistake or unintentionally, the measure of damages would be the value of the coal taken at its market value in the vein or before severing from the soil, together with such other damages as resulted to the real estate from the trespass; but if the trespass was wrongfully and intentionally committed, the measure of damages would be the value of the coal converted at the place where it lay after it had been mined, allowing nothing to the trespasser for mining the same. *Sunnyside Coal & Coke Co. v. Reitz*, Ind. App. (39 N. E. Rep. 541). The court say: "There is some conflict in the authorities as to the proper measure of damages in such cases. In *Wooden-Ware Co. v. U. S.*, 103 U. S. 432 (1 Sup. Ct. 398), Justice Miller, after stating the rule in willful trespass to be the full value of the property at the time and place of demand or suit brought, with no deduction for labor or expenses, says: 'There seems to us to be no doubt that in the case of a willful trespass the rule as stated above is the law of damages, both in England and in this country, though in some of the state courts the milder rule has been applied, even in this class of cases. * * * On the other hand, the weight of authority in this country, as well as in England, favors the doctrine that where the trespass is the result of inadvertence or mistake, and the wrong was not intentional, the value of the property when first taken must govern, or, if the conversion sued for was after value had been added to it by the work of the defendant, he should be credited with this addition.' The rule in this state in cases of willful trespass, is that the owner may recover his chattels in specie, so long as their identity can be determined, no matter how much value may have been added to them by the labor of the wrongdoer; and, if the chattels have been converted, he may recover the value at the time of the conversion, in the form in which they then existed, if he is content therewith, though he is

entitled to the highest price at any time between the taking and the conversion. *Ellis v. Wire*, 83 Ind. 127. As soon as the coal in controversy in this case was severed from the soil, it became personal property; and for carrying it away, and converting it to its own use, the appellant became liable for such damages as might be assessed, as in cases of other kinds of personal property. *Railway Co. v. Swinney*, 97 Ind. 586 (598); 1 Hill. Torts, p. 501; *Hall v. Reed*, 15 B. Mon. 479. While the coal lay in the vein, it was a part of the realty, when it became severed, it became a chattel. The change in its condition did not change its ownership. It still belonged to the owner of the soil. He was entitled to recover its possession, and, if this could not be done, he was entitled to recover its value as a chattel. If a trespass is willful and intentional, the law will not permit the trespasser to profit by his own wrong. Whatever labor the trespasser voluntarily bestows upon property under such circumstances he must lose. If the trespass is the result of a mistake, the damage may be reduced by the value of the labor expended upon it. The one is a positive aggressive wrong; the other, a mere inadvertence. As bearing upon the measure of damages in such cases, see, *Everson v. Sellers*, 105 Ind. 266 (4 N. E. Rep. 854); *Yater v. Mullen*, 24 Ind. 277; *Martin v. Porter*, 5 Mees. & W. 352; *Coal Co. v. McCulloh*, 59 Md. 403; *Coal Co. v. Cox*, 89 Md. 1; *Robertson v. Jones*, 71 Ill. 405; *Coal Co. v. Lennon*, 91 Ill. 561)."

TRUSTS.

MENKEN CO. V. BRINKLEY.

(94 Tenn. 721.)

Fraud of creditors — Spendthrifts trusts. The case of *Jourolmon v. Massengill*, 5 S. W. 719, 86 Tenn. 81, determining that, under the act of 1832 (Code, § 4283), one person may convey property in trust for the benefit of another, and so limit and restrict it as to exempt it from the debts of the beneficiary thereafter created, does not authorize the creation of such trust by a person for his own benefit. Such a trust cannot

be created by a grantor, he being the only beneficiary, either by a direct exemption of the property from his future debts, or indirectly by leaving it discretionary with the trustee to allow him benefits from the property.

Judgments of foreign justices of the peace — Faith and credit. A judgment before a justice of the peace of another state falls within the provisions of section 1, art. 4, of the constitution of the United States, requiring each state to give full faith and credit to the judicial proceedings of every other state.

(Syllabus by the judge.)

SMITH, Special Judge.

Sec. 836. Statement of the case—Spendthrift's trust deed. On the 10th day of December, 1887, Robert C. Brinkley, a young man of improvident and extravagant habits, executed a conveyance by which he transferred a large amount of real estate, therein described, part of which is in Shelby county, Tenn., to his half-brother, Hu. L. Brinkley, and his brother-in-law, C. C. Currier, upon certain trusts, specifically defined and set out in said instrument. As the contest in this cause is over this deed, it is necessary that its contents be stated, and it will perhaps be more satisfactory to set out the deed in full. It is as follows: "This indenture, made between Robert C. Brinkley, party of the first part, and C. C. Currier and Hu. L. Brinkley, trustees, parties of the second part, witnesseth: That, upon the trusts and for the purposes hereinafter set out, the party of the first part has bargained and sold, and by these presents does grant, bargain, sell, and convey, unto the parties of the second part, their heirs and assigns, as trustees, the following described real estate, situated in Shelby county in the State of Tennessee, to wit, to have and to hold, with all the improvements and appurtenances, all of the real estate so hereinbefore described, to the parties of the second part, their heirs and assigns, in fee-simple fee; and the party of the first part, for himself, his heirs and personal representatives, does hereby covenant with the parties of the second part, their heirs and assigns, that he will forever warrant and defend the title to the property so conveyed against the legal claims of all persons whomsoever. But this conveyance is made upon the trusts and conditions following. The party of the first part is now considerably in debt. It is not the purpose of the party of the first

part to acknowledge hereby any specific debts, nor in any way to estop himself or the parties of the second part from contesting the validity of any claim that may be made, or from making any legal defense thereto, but it is desired that his just debts shall be paid out of the property hereby conveyed or its proceeds, and the payment of such debts is one of the trusts and purposes of this conveyance. The property hereby conveyed is mostly unimproved and unproductive, and another purpose and trust is that it may be improved and provision made for the payment of the taxes, insurance, and other costs and expenses attaching to it. A further trust and purpose is that the parties of the second part shall control, manage, protect, and preserve the property, and have full power and direction to deal with it in all respects as to them may seem best for the efficient discharge of the trusts. Therefore, the parties of the second part are hereby vested with the absolute title to all of said property, and with full power to sell and convey it, or any part of it, or to exchange it, or any part of it, for other property, in their own discretion, whenever and however they may deem best; and no purchaser from them is required to look to the application of the purchase money. Said parties of the second part are further clothed with full power and discretion to use any portion of said property, or the proceeds of any of it when sold, or any property acquired by exchange, or its proceeds, in improving other portions of the trust by erecting such buildings or making such other improvements, as the parties of the second part may deem best, and also to use the same in paying the just debts of the party of the first part, and in reimbursing the parties of the second part for any advances made, and for paying debts which the parties of the second part may find it necessary or expedient to make as trustees upon the faith of the said property, or to incur and raise by mortgages or liens upon said property. The parties of the second part may also, in their discretion, make advances from said property or its proceeds, from time to time, as they may choose to do so, to the party of the first part, provided that they shall not in any one year advance or pay him more than the sum of six hundred dollars until the net annual income from said property shall amount to the sum of six hundred dollars per annum; and, if

its net annual income shall ever exceed that amount, then the parties of the second part may increase such advancements in their discretion. The discretion to make such advances or payments whenever it may to them seem best is not limited, however, to advances out of the income or profits of the property, but extends to the corpus of its proceeds. It is expressly hereby provided that the parties of the second part are to be under no obligation whatever to advance or pay to the party of the first part anything whatever out of said property or its proceeds, and that the party of the first part shall have no right to assert any claim therefor, nor to anticipate or alienate any claim therefor, nor in any way to interfere with the control or management of the said property, nor to incumber it. The power to sell and convey hereby conferred upon said trustees includes the power to mortgage for the purpose of the trusts; and the general scope of the powers shall include leasing, renting, insuring, paying taxes, and doing any and all things which said trustees shall consider proper. If at any time said trustees shall deem it advisable to advance their own money or use their own credit in raising money for the purposes of the trusts, the property held in trust shall be bound in their hands for such advances or for debts or obligations so incurred. As compensation for services rendered in the execution of this trust, said trustees shall be entitled to and may retain, out of any moneys coming into their hands, a commission of ten per cent. upon all the money that shall pass through their hands as such trustees. If they shall acquire other property by purchase or exchange, they will take title as trustees, subject to the trusts, powers, and discretions, and to all the provisions of this conveyance. This trust is to continue during the life of the party of the first part, but it is hereby expressly provided that the said trustees may at any time after two years from the date hereof, at their discretion, and solely at their discretion, put an end to it by a reconveyance of the trust property to the party of the first part; and also that the said trustees may at any time, with the concurrence of the party of the first part, appoint some other person or persons as trustees, and convey the trust property to such person or persons to be held under the trusts and provisions of this conveyance. Whenever there is more than one trus-

tee, in the case of death, resignation or refusal to act of one, the trust shall survive and be exercised fully by the other. The party of the first part expressly reserves the power to appoint, by his last will and testament, the person or persons who shall take the property held under this trust at his death, and to provide for and control the destination of said property. In the event that he shall die without exercising this power of appointment, the property then held under this trust shall go at his death, absolutely and in fee, under the laws of descent and distribution of the state or states in which it shall be situate, as if he had owned it at the time of his death, and had died intestate in regard to it. It is hereby expressly provided that the said parties of the second part, or the survivor of them, or their successor or successors, shall not be required to execute any bond or other security as trustee or trustees under this conveyance. In witness whereof, the party of the first part does hereto set his hand and seal, on this 10th day of December, 1887. Robert C. Brinkley. [Seal.]”

After the execution of this deed, R. C. Brinkley, the grantor, contracted other debts, which have been reduced to judgments at law against him, upon which executions have been returned unsatisfied; and on July 11th, 1898, the J. S. Menken Company, one of the judgment creditors, filed the original bill in this cause, claiming that said R. C. Brinkley has an equitable interest in the property conveyed, and seeking to subject it to the satisfaction of the judgment. Such proceedings were had that other judgment creditors of this state became parties complainant, and also several creditors with judgments rendered in California, to which state, it seems, Brinkley had removed. The chancellor's decree was in favor of all parties complainant, and subjected the property conveyed to the satisfaction of their debts. From this decree, H. L. Brinkley, the acting trustee, the other having resigned, alone appealed. At the outset, it is proper to say that we do not think that it was the intention of the grantor, in this deed, to provide for the payment of debts which he might contract after its execution. On the contrary, his intention clearly was that the property conveyed should not be subjected to any debts thereafter created by him during the continuance of the trust. This trust is what is denominated an “active trust,”

conveying the legal title to the trustees, and imposing active duties on them to be performed. *Jourolman v. Messengill*, 86 Tenn. 96-99 (5 S. W. Rep. 719); *Henson v. Wright*, 88 Tenn. 501 (12 S. W. Rep. 1035). In this, as in all other trusts, there must be a *cestui que trust*; and it is evident that the grantor himself is the beneficiary. We cannot therefore yield to the ingenious argument of counsel for appellant that R. C. Brinkley, the grantor, has no interest in the trust property which he can enforce. If the trustee should claim the right to withhold all benefits from the grantor, there can be no doubt, the question of fraud out of the way, that the grantor could assert and maintain his rights in a court of equity. If the grantor in this deed reserves no rights to himself, it follows that it is a trust without a beneficiary, and the trustee becomes, in effect, the owner of the property conveyed. But we go further, and hold that, unless the owner of the property can convey it in trust, and reserve to himself benefits directly, and at the same time exempt it from liability for his future debts, he cannot do so indirectly by conferring discretion on the trustee to withhold all benefits from him; for, if this can be done, the owner need only select, as trustee, a near kinsman or tried friend, on whom he may rely for liberality, and thus indirectly accomplish what he cannot do directly. Taking this view of this deed, it becomes necessary to determine whether the owner of property may convey it in trust, he himself being the *cestui que trust*, and exempt it from the payment of debts which he may thereafter contract.

Sec. 837. Fraud of creditors—Spendthrift's trust. Whether one person can convey property in trust for the benefit of another, who is *sui juris*, and so limit and restrict it as to shield it from the debts of the beneficiary, has been much discussed. The English courts, as stated by this court in *Jourolman v. Massengill*, 86 Tenn. 81 (5 S. W. Rep. 719), hold that such exemption cannot be made; and most of the states in the Union have followed the English rule. Mr. Gray, Story professor of law in Harvard University, published in 1883 a book on Restraint on Alienation of Property, in which he collated the decisions of the several states on these "spendthrift trusts," as they have been aptly termed. The result

was that up to that time only two states—Pennsylvania and Massachusetts—held restraints on alienation and liability for debts valid. Gray, Restr. Alien. Prop., § 175, *et seq.* To the authority of the cases of these two states must be added the great weight of the supreme court of the United States. In the case of *Nichols v. Eaton*, 91 U. S. 716, and *Spindle v. Shreve*, 111 U. S. 542 (4 Sup. Ct. Rep. 522), the same doctrine is held. Mr. Gray places Tennessee in the list of states which have followed the English rule, and held such trusts invalid in so far as they attempt to restrain alienations, either voluntary or *in invitum* by creditors. This he was authorized to do by the cases of *Turley v. Massengill*, 7 Lea. 358, and *Hooberry v. Harding*, 10 Lea. 392, which he cites. But the later case of *Fourolman v. Massengill*, 86 Tenn. 81 (5 S. W. Rep. 719), overrules these two cases, and upholds these restraints, in a trust created by one person for the benefit of another. The decision is based on the act of 1832 (Code, § 4288; Mill. & V. Code, § 5026). But it has been nowhere held that the owner of property may himself convey it in trust, he being the *cestui que trust*, and exempt it from liability for debts which he may create; and we think the section of the Code just referred to in direct terms gives the creditor whose execution has been returned unsatisfied, in whole or in part, the right to reach in the chancery court, and subject to his judgment, property held in trust for his debtor, when this trust has been created by the debtor himself. The case of *Fourolman v. Massengill*, 86 Tenn. 81 (5 S. W. Rep. 719), in construing this section, holds that such property cannot be reached when the trust has been created by a person other than the debtor; and it just as clearly follows that it may be reached when the trust is created by the debtor himself. But, in the absence of a statute positively so directing, we could never hold that the owner of property can so convey it as to enjoy the benefits arising from it, and shield it from debts which he may create, even if he be a spendthrift. And we have yet to learn that a spendthrift has rights superior to those of other people. If a spendthrift may do this thing, any other person can; and what would be the condition of society commercially if every man can make his neighbor his trustee to manage his property, so that he may enjoy its benefits, and

at the same time protect it from his debts, we will not endeavor to depict. It is a general rule that all property to which a debtor has a right may be subjected to his debts, unless the state shall see fit to exempt a portion of it. *Hawkins v. Pearce*, 11 Humph. 44. As one of the counsel for complainants has well said, it is an elementary principle that a party *sui juris* cannot so convey his property as to enjoy the benefit of its income, and exempt it from his debts. See Tied. Real Prop., § 503; 4 Kent's Comm., p. 811, note a; 2 Perry, Trusts, § 555; 23 Am. & Eng. Enc. Law, p. 10, and notes; *Harding v. Insurance Co.*, 2 Tenn., Ch. 465; *Fourolman v. Massengill*, 86 Tenn., at pages 104, 105 (5 S. W. Rep., at page 719). In Pennsylvania and Massachusetts the decisions of which states, it has already been said, have been most favorable to spendthrift trusts, attempts have been made to uphold, against creditors, trusts like the one under consideration; but they have failed. In *Mackason's Appeal* (decided in 1862), 42 Pa. St. 880 (82 Am. Dec. 517), the court say: "This statement brings us to a simple inquiry, can the owner of property so dispose of it, for his own use, benefit and support, as to put it beyond liability for his future debts, he being and continuing *sui juris*, and there appearing to be no reason, except to withdraw it from such liability, and thus retain the temporal ownership without its incidents? This would be a startling proposition to affirm. It would revolutionize the credit system, entirely destroy all faith in the apparent ownership of property, and repeal all our statutes and decisions against frauds. Every man about to engage in business, where there was a chance of loss, would place himself under the pupilage of trustees, and everybody's estate would be passing under settlement deeds and trustee's accounts, through the courts, before, in the natural course of things, the jurisdiction of the orphan's court would attach. Such consequences from judicial action need not be deprecated in advance, for they can never occur." And in *Ghormley v. Smith*, 139 Pa. St. 584 (21 Atl. Rep. 135; 11 L. R. A. 565; 23 Am. St. Rep. 215), it is said: "But whilst, in the recognition of spendthrift trusts, we have departed from the English rule, there is no case in Pennsylvania which goes to the extent of recognizing a spendthrift trust in which the grantor is himself the sole beneficiary

for life, with power to dispose of the trust property at the death, yet neither the income nor the *corpus* of the estate is subject to his debtors." The policy of our law is otherwise, and in *Mackason's Appeal* it has been plainly so decided. This case was decided in 1891. And in Massachusetts the decision is the same way. *Bank v. Windiam*, 133 Mass. 175. Nor do we think that the cases of *Ashhurst's Appeal*, 77 Pa. St. 464, and *Earp's Appeal*, 75 Pa. St. 119, are to the contrary. As we understand these cases they only hold that such trusts are valid as between the grantor and grantee, and cannot be revoked by the grantor. Counsel for appellant seem to shrink from arguing that the owner of property may convey in trust, and exempt it from debts thereafter created, reserving to himself a substantial benefit. They prefer to rely on the position that the grantor in this deed reserves no substantial interest in the property. This contention we have already noticed. They refer, however, to the case of *Mills v. Mills*, 3 Head 705, as an authority to support the attempted exemption in this deed. The case cited is poorly reported, the reporter making no statement of facts at all, but referring to the opinion for the facts. And in the opinion we find no statement which shows distinctly the points at issue. It is true the opinion shows there was a deed by the owner of the property, conveying it to a trustee, in trust to pay existing debts, and to hold the residue for the support of the grantor and his family, during the life of the grantor, with remainder at his death to his children. Here seems certainly an interest to the extent of his support, jointly with his family, reserved to the grantor. But the conveyance was for the benefit of the wife and children, with remainder to the children, and with a provision that the income of the property could only be subjected to such debts or contracts of the grantor as should be made for the necessary support of himself or his wife and children; and that the body of the fund, or the property purchased therewith (the trustee having power to invest the fund in other property, with other large powers), should not be subject to any debts thereafter made by the grantor, unless authorized by the trustee. It is also said in the opinion "that the body of the property cannot be applied to any debt of the said

James T. [the grantor] contracted after the making of the deed, being satisfied, as we are, that the trustee never at any time gave his sanction to any of said debts; neither can the interests, rents, or hires be applied to any such debt, unless shown to be for the necessary support of the said James T. or his wife and children." From this we may infer that debts were claimed in the suit. But as the deed itself was a proper deed, and free from fraud in so far as it provided for the support of the grantor's wife and children, and as the only interest reserved to the grantor was the right to a support for himself in connection with them, that is the only interest which his creditors possibly could have reached. And there is nothing in the opinion to show that judgment creditors, with returns of executions unsatisfied, were seeking to ascertain and subject that interest. On the contrary, if creditors were proceeding at all, they were attempting to subject the entire body of the property or the entire profits. We do not think, therefore, that this opinion can be taken as an authority to support the contention of appellant. And it may be observed that it might very well have been held in *Mills v. Mills*, that the grantor had no separable interest in the property conveyed, which could have been separated from that of his wife and children, the other beneficiaries, so far as to be subjected to his debts, as was held in Virginia, in *Markham v. Guerrant*, 4 Leigh 279, and *Johnston v. Zane*, 11 Grat. 552. See Gray, Restr. Alien, §§ 176, 242-249. And it is significant that this case has not been cited in the opinions in any of the reported cases on this subject in this state. It is also insisted for appellant that by the reservation of the power to appoint by will the persons to whom the property shall go after the death of the grantor, R. C. Brinkley, and by the provision that, in case he fails to make an appointment, it shall go to the persons who would be entitled under the laws of descent and distribution, an interest in remainder is created, which at least cannot be subjected to the debts of the grantor. There is certainly no remainder in any appointee under a will, for a will may never be made, and, if made, could only take effect at the death of the testator, and then only upon the property remaining; and, if Brinkley should die intestate, his property would descend to his heirs and distributees, whether the deed

so provided or not. But, beyond this, there is a clause in the deed giving the trustees, after two years, the power to terminate the trust, and reconvey the property to Brinkley. This seems to us conclusive that no remainder interest was created or intended to be created; and even if there were a remainder, the rents and profits of the property, during Brinkley's life, could be subjected to his debts.

Sec. 838. Fraudulent trust deed good between the parties. The complainants have prosecuted a cross appeal from that part of the decree in which the chancellor refused to set aside this deed. In this the decree is clearly correct. The deed is good as between the grantor and the trustee (the grantee) as long as the trustee chooses to continue the trust. It is only invalid in so far as it attempts to shield the property from the creditors of the grantors. And the property is a trust fund in the hands of the trustee for the payment of the debts of the grantor, whether contracted prior or subsequent to the execution of the deed of trust. *Mackason's Appeal*, 42 Pa. St. 830 (82 Am. Dec. 517).

Sec. 839. Judgments—Foreign justices of the peace—Faith and credit. No question is made as to the validity of the debts of the Tennessee creditors, complainants in the cause. Having judgments and returns of *nulla bona*, they are clearly entitled to have their judgments satisfied, under § 4088 (Mill & V. Code, § 5026) of the Code. But there are several judgments rendered in California, two of which were before justices of the peace of that state, which are embraced in the chancellor's decree. No case in this state has been brought to our notice deciding that a judgment before a justice of the peace of another state falls within the provisions of § 1, Art. 4, of the constitution of the United States, requiring each state to give full faith and credit to the judicial proceedings of every other state. But the current of authority is that way, and we now so determine. See 2 Black, Judgm., §§ 934, 935; 12 Am. & Eng. Enc. Law, p. 505, note 1. And the Code, § 8796 (Mill. & V. Code, § 4549), provides a method for the authentication of such proceedings. The other California judgment is a court of record. There is no former defense of *nul tiel* record; but various objections to the California rec-

ords and proceedings are made, and assigned as error; and it is insisted that they are properly made under the agreement of counsel, entered into before the hearing of the case below. It may be that the objections might have been made below, under this agreement. But if they were so made, and were acted upon by the chancellor, the record fails to show it, and they cannot be noticed now. If made, there the defects in the certification of the proceedings, if they really exist, might have been remedied by leave to have them amended; and other difficulties, now suggested, might have been cured by proof. This court will not put the chancellor in error if there really was error as to these objections, unless they were made before him, and acted on by him. These California creditors are therefore entitled to relief, under § 4278 (Mill. & V. Code, § 5040) of the Code, which is as follows: "When a judgment has been recovered in any other state against a resident of such state, and the creditor has exhausted his legal remedy, the real or personal property of the debtor in this state may be subjected to the satisfaction of such debt, by bill stating the facts under oath, and filed in the courts of the district in which the property is situated." The result is that the decree of the chancellor subjecting the property conveyed by the trust deed to the satisfaction of the several judgments of complainants is affirmed, and defendant H. L. Brinkley, the trustee, will be directed to pay them out of the trust property.

Sec. 340. Spendthrift trusts—Validity of provisions exempting property from debts of cestui que trust. The case reported above is directly supported by *Mackason's Appeal*, 42 Pa. St. 330 (82 Am. Dec. 517); *Ghormley v. Smith*, 139 Pa. St. 584 (21 Atl. Rep. 135; 23 Am. St. Rep. 215; 11 L. R. A. 565); *Pacific Nat. Bank v. Windram*, 133 Mass. 175. In Georgia it is held that a person cannot, by deed, create out of his own property, upon his own behalf, a trust estate. A deed executed for such a purpose is void, and passes no interest, legal or equitable, to the trustees named. In such a case the whole title remains in the grantor, and the property so sought to be conveyed is subject to the payment of his debts. *Sargeant v. Burdett*, 96 Ga. 111 (22 S. E. Rep. 667). Although there is an irreconcilable conflict between the cases the weight of modern decisions is to the effect that an owner of property may devise or convey it in trust for another, with the provision that the income shall not be alienated by the beneficiary by an anticipation, or be subject to be taken by his creditors in advance of its payment to him, although there is no cesser or limitation over of the estate in such

an event. *Nichols v. Eaton*, 91 U. S. 716; *Brooks v. Reynolds*, 8 C. C. A. 370; *Steib v. Whitehead*, 111 Ill. 247; *Pope v. Elliott*, 8 B. Mon. 56; *Roberts v. Stevens*, 84 Me. 325 (24 Atl. Rep. 873; 17 L. R. A. 266); *Smith v. Towers*, 69 Md. 77 (14 Atl. Rep. 479; 15 Atl. Rep. 92; 9 Am. St. Rep. 398); *Broadway National Bank v. Adams*, 133 Mass. 171 (43 Am. St. Rep. 504); *Slatery v. Wason*, 151 Mass. 266 (23 N. E. Rep. 843; 7 L. R. A. 393; 21 Am. St. Rep. 448); *Leigh v. Harrison*, 69 Miss. 923 (11 So. Rep. 604; 18 L. R. A. 49); *Lampert v. Haudel*, 96 Mo. 439 (9 S. W. Rep. 780; 9 Am. St. Rep. 358; 2 L. R. A. 113); *Campbell v. Foster*, 35 N. Y. 361; *Shankland's Appeal*, 47 Pa. St. 113; *Rife v. Geyer*, 59 Pa. St. 393 (98 Am. Dec. 351); *Jourolman v. Massengill*, 86 Tenn. 81 (5 S. W. Rep. 719), overruling *Turley v. Massengill*, 7 Lea. 359, and *Hooberry v. Harding*, 10 Lea. 391; *White v. White*, 30 Vt. 338; *Barnes v. Dow*, 59 Vt. 530 (10 Atl. Rep. 258); *Garland v. Garland*, 87 Va. 758 (13 S. E. Rep. 478; 24 Am. St. Rep. 682; 13 L. R. A. 212).

The English authorities, as well as some of the courts of the states, hold that although property may be given to a person until he shall become bankrupt he cannot be vested with the benefit of a life estate without the incidents thereof, and that provisions excepting the property conveyed by such trusts from the debts of the *cestui que trust* are void. *Brandon v. Robinson*, 18 Vesey 429; Pingrey on Real Prop. § 1080 and cases cited; *Kennedy v. Nunan*, 52 Cal. 326; *Mebame v. Mebame*, 4 Ired. Eq. 131 (44 Am. Dec. 102); *Pace v. Pace*, 75 N. C. 119; *Heath v. Bishop*, 4 Rich. Eq. 46 (55 Am. Dec. 654); *Tillinghast v. Bradford*, 5 R. I. 205. In the last case the court say! "It is quite clear that it was the intention of the testator to make an alimentary provision for his son during his life which should give him all the advantages of an estate in fee without the legal incidents of such an estate—alienability and subjectiveness to the payment of the son's debts. Such restraints, however, are so opposed to the nature of property, and, so far as subjectiveness to debts is concerned, to the honest policy of the law, as to be held void, unless indeed, which is not the case here, in the event of its being attempted to be aliened or seized for debts, it is given over by the testator to some one else. This has been the settled doctrine of the court of chancery, at least since *Brandon v. Robinson*, 18 Vesey Jr., 429-434, and in application to such a case as this is so honest and just that we would not change it if we could. Certainly no man should have an estate to live on, but not an estate to pay his debts with. Certainly property valuable for the purposes of pleasure or profit should be also amenable to the demands of justice." For extensive reasoning in the line of these authorities and a collection of the English and American cases on both sides of the question, see Gray on Restraints on Alienations, §§ 217-268b.

Sec. 841. Spendthrift trusts—Debts of beneficiary. Kentucky has a statute (Gen. Stat., Ch. 63, Art. 1, § 21; Ballards' Ky. Real Est. Stat., § 378) which provides that the beneficial interest of a *cestui que trust* shall be liable for his debts; and conveyances and devises in controvention of the statute are void. *Marshall's Trustee v. Rash*, 87 Ky. 116 (7 S. W. Rep. 879; 12 Am. St. Rep. 467); *Bland's Admr. v. Bland*, 90

Ky. 400 (14 S. W. Rep. 432; 29 Am. St. Rep. 390). A provision in an instrument creating a spendthrift trust that if the income of the property should be decreed to be subject to his debts the trustee should thereafter pay the same to the wife of the *cestui que trust* as her separate property, or expend it for the benefit of her and the family, is valid. *Bull v. Kentucky Nat. Bank*, 90 Ky. 452 (14 S. W. Rep. 425; 12 L. R. A. 37; see Vol. 3, § 557). Citing, *Bramhall v. Ferris*, 14 N. Y. 44 (67 Am. Dec. 113). A statute (Ohio Rev. Stat., § 5464) giving judgment creditors an action to reach equitable interests of their judgment debtors does not apply to a trust in which the beneficiary has no right to demand any distributive part of the income, and under which the trustee is to apply and personally expend the income in the maintenance and support of the debtor as one of a family collectively to be maintained. *Brooks v. Reynolds* (59 Fed. 923). In the absence of a valid declaration for accumulation, the creditors of a *cestui que trust* who is entitled to receive the income from trust property may, under How. Mich. Ann. Stat., § 5575, subject to their claims the surplus income beyond what is necessary for the suitable support and maintenance of the beneficiary. *Spring v. Randall*, Mich. (64 N. W. Rep. 1063). Where property conveyed in trust is not subject to the debts of the *cestui que trust* it does not pass to his assignee in insolvency. *Billings v. Marsh*, 153 Mass. 311 (26 N. E. Rep. 1000; 25 Am. St. Rep. 635; 10 L. R. A. 764). Although a will declares a certain devise of a life estate to be "in trust" if no trust is specified and the absolute control of the income is vested in the devisee, it is liable for his debts, and a provision in the will excepting it from such liability is void. *Hahn v. Hutchinson*, 159 Pa. St. 133 (28 Atl. Rep. 167).

EPITOME OF CASES.

Sec. 842. As to the creation of express trusts. A contract creating an express trust must be in writing. *Dunn v. Zwilling*, Ia. (62 N. W. Rep. 746); *Sherley v. Sherley*, Ky. (31 S. W. Rep. 275). If the husband purchases land with his own money, and voluntarily procures the title to be conveyed to his wife, the presumption is that he intended it as a gift to her, and no trust for him will result. A writing intended to operate as a will, but which fails as such by reason of imperfect execution, cannot operate as a declaration of trust, unless it contains, on its face, a clear and distinct declaration that the title to the land has been, as a matter of fact, from the beginning, held in trust by the would-be testator for the benefit of the devisee named. *Leslie v. Leslie*, 53 N. J. Eq. 275 (31 Atl. Rep. 170). Where an instrument creating a trust is actually delivered it will not be

defeated by subsequent declarations and acts of the parties nor by the fact that the donor retains possession. *Williams v. Evans*, 154 Ill. 98 (39 N. E. Rep. 698). Where a father causes a deed to land, for which he has himself paid the purchase money, to be made to himself, as guardian of his minor son, for whom he is neither a testamentary nor (because of his not having given bond as such) a statutory guardian, the legal effect of such conveyance is the creation of a trust in the land in favor of the minor son, and the position of the father with reference to this estate is really that of a trustee, and not, technically, that of a guardian. *McCrary v. Clements*, 95 Ga. 778 (22 S. E. Rep. 675). Under Mich. How. Ann. St., § 6179, which provides that no estate or trust in lands shall be created unless by operation of law or deed in writing, it is held that where a husband purchased land in his wife's name, with the parol understanding that it was to be occupied as a home by them so long as each should live, but the wife devised it to others, the husband cannot enforce a trust against the devisee. *Chapman v. Chapman*, Mich. (65 N. W. Rep. 215). An oral statement of a purchaser of land at the time of making the purchase to the effect that he is buying the land for another is not sufficient to create a trust in favor of the person for whom he says he is making the purchase. *McDearmon v. Burnham*, 158 Ill. 55 (41 N. E. Rep. 1094). Where the land is held in trust money arising from its sale is held likewise by one having knowledge of the trust. *McArthur v. Robinson*, 105 Mich. 540 (62 N. W. Rep. 713).

Sec. 843. Voluntary settlements—Validity of trusts.

Where a parent conveys land to one of his children as trustee, by a deed which provides that the trustee shall sell the property after the grantor's death, and divide the proceeds among the children, reserving the power of revocation, it is held that such an instrument is not testamentary in its character, but is a valid, express trust, passing a present interest subject to divestiture by revocation, the enjoyment to commence in the future, and that such trust is not revoked by the grantor's subsequent failure to recognize the trust nor need such deed have any consideration other than the grantor's love and affection

for his children. *Nicholas v. Emery*, 109 Cal. 323 (41 Pac. Rep. 1089; 50 Am. St. Rep. 43).

Sec. 844. Parol proof of express trusts. In a recent case it is said: "It is well established that although a conveyance of lands is absolute in terms, and on its face purports to convey an estate in fee, it may, nevertheless, be shown that the lands are held by the grantee in trust, and that the terms of such trust may be shown by oral testimony. In order, however, that the lands so conveyed may be impressed with a trust, the trust must be created and its terms agreed upon by the parties to the instrument at the time of its execution, or the instrument must be executed in pursuance of such previous agreement. An absolute conveyance of lands cannot, after its execution, be turned into a trust by any oral declarations of the parties thereto. The statute of frauds forbids the creation of a trust in real property by simple verbal declarations of its owner, and a grantor cannot by any subsequent declarations defeat the effect of his deed. It is also well established that the evidence which will authorize a court to find that a conveyance of lands which is absolute in terms was in reality made upon a trust must be clear, satisfactory, and convincing; that the parties to an instrument which is clear and unambiguous in its terms must be presumed to have intended the legal effect of those terms, unless it is clearly and satisfactorily shown that it was their mutual intention that those terms should have a different effect. *Mahoney v. Bostwick*, 96 Cal. 58 (30 Pac. Rep. 1020; 31 Am. St. Rep. 175); *Ensign v. Ensign*, 120 N. Y. 656 (24 N. E. Rep. 942). The burden of proof to thus vary the terms of the instrument is upon the party who claims contrary thereto, and he must establish his allegations by a preponderance of evidence. If the verbal declarations are contradictory or uncertain, the presumption that the instrument correctly expresses the agreement between the parties is not overcome. This issue is purely one of fact, and is to be determined by the trial court; and to the extent that its determination rests upon the mere preponderance of evidence, or upon the consideration of conflicting or contradictory evidence, the finding of the trial court is not open to review in this court. *Brison v. Brison*, 90 Cal. 334 (27 Pac. Rep. 186)." *Sherman*

7. *Sandell*, 106 Cal. 378 (89 Pac. Rep. 797). It is held that where lands are conveyed under a parol trust to sell and convert into money for the benefit of the grantor, and the trust has been so far executed by the trustee as to sell the land and receive the money, the facts may be established by parol evidence in an action for the money had and received. *Harris v. Clark*, Ia. (62 N. W. Rep. 854). While the statute of frauds is a bar to the enforcement of parol trusts concerning lands, it does not render them illegal and the parties may perform them if they think proper. A trust of this kind may be shown to exist not for the purpose of enforcing it, but for the purpose of showing that it has been fully executed. *Sunnyside Coal & Coke Co. v. Reitz*, Ind. App. (89 N. E. Rep. 541).

Sec. 845. Construction of trust deeds. Where a conveyance is made by the trustee of a husband to his wife with the consent of the husband, the presumption arises that it was made by way of an advancement for future support, from love and affection, but this presumption may be rebutted by parol testimony. *Walston v. Smith*, 67 Vt. 542 (82 Atl. Rep. 486). Where a trust deed requires no duties to be performed by the trustee the title vests directly in the *cestui que trust*. *Sullivan v. Chambers*, 18 R. I. 799 (81 Atl. Rep. 167). For construction of trust deeds depending upon particular facts, see *Simons v. Richardson*, 107 Ala. 697 (18 So. Rep. 245).

Sec. 846. Powers, duties and liabilities of trustee. A power of sale conferred by a trust deed upon an original trustee passes to, and can be legally exercised by, a new trustee appointed by the court. *Fields v. Bush*, 94 Ga. 664 (21 S. E. Rep. 827). A trustee cannot be permitted to deprive himself of a power for the benefit of the trust, or to so fetter its exercise by himself or his successor as to defeat the benefit of the trust. Under a power to sell during the life of a particular husband and a peremptory direction to sell immediately after his death, the trustee cannot grant the privilege of buying at any time within a prescribed number of years. *Hickok v. Still*, 168 Pa. St. 155 (81 Atl. Rep. 1100). A trust once created and accepted cannot be altered or changed, either by the donor or trustee, without the consent of the beneficiary.

Brunson v. Henry, 140 Ind. 455 (39 N. E. Rep. 256). A trustee must assume the validity of the trust under which he acts until it is actually impeached. His duty is to manage the interests of his *cestui que trust*, and not to keep his conscience or betray his title or interest, and he can make no admissions prejudicial to the interests of his *cestui que trust*. A trustee who has accepted and entered upon the administration of a trust cannot allege the invalidity of his appointment as a defense for not accounting for the trust property. A trustee in the care and management of the trust estate is held to at least such degree of care, judgment and discretion as a man of ordinary prudence and capacity would exercise with regard to his own property. A trustee holds as much for the benefit and protection of those entitled to the estate in remainder as of those to whom the immediate beneficial enjoyment is given. The duties and obligations of trustees, in the care and skill with which they should perform the duties assumed by them, prevent them from taking advantage of blunders and mistakes which they themselves have made, and which have misled their *cestius que trustent*. *Saunders v. Richard*, 35 Fla. 28 (16 So. Rep. 679). For cases which depend upon particular facts illustrating the power of trustees over real estate to which they hold title, see *Gomez v. Gomez*, 147 N. Y. 195 (41 N. E. Rep. 420). Trustees are liable for unauthorized acts. *Shaw v. Devecmon*, 81 Md. 215 (31 Atl. Rep. 709). Where one accepts of a conveyance of real property upon the express condition that it is to be by him conveyed to another, his willful refusal to so convey renders him liable for such damages as shall thereby be caused to the party entitled to receive conveyance, either by expenses of litigation rendered necessary or from the loss of an opportunity to sell such lands at a good price while conveyance is wrongfully withheld. *McMurtry v. Blake*, 45 Neb. 213 (63 N. W. Rep. 467).

Sec. 847. Removal of trustees. A trustee who fails and refuses to obey a decree of a competent court may be removed. *Harrison v. Union Trust Co.*, 144 N. Y. 326 (39 N. E. Rep. 353). In a recent case the supreme court of Illinois say: "Where lands are conveyed in trust, and the trustee enters into possession of the property under the deed, it is

a plain proposition that he is bound to observe the terms and conditions of the instrument under which he receives a conveyance of the property; and if he fails to discharge his duty as trustee, and attempts to divert the property to a use not contemplated by the deed, or appropriates it to his own use, a court of equity will remove him, and appoint a trustee who will carry out the trust as contemplated by the instrument under which it was created. This rule is so familiar and so well understood that it will not be necessary to cite anything to sustain it." *Guilfoil v. Arthur*, 158 Ill. 600 (41 N. E. Rep. 1009).

Sec. 848. Trustees dealing with trust estate. A trustee who is a party to a trust deed, who has accepted the trust, acted under the deed, and taken possession of the property, the grantor raising no objection, cannot for his own benefit surrender the trust deed, and take a deed in his own name to the same property, to the injury of his *cestui que trustent*. A trustee should not purchase the trust estate from his *cestui que trust*. The law regards with a jealous eye all transactions between persons occupying these confidential relations. As a general rule a court of equity will avoid the contract altogether without proof of fraud, and will never sustain it except where the trustee clearly proves the fairness of such transaction, and that it was advantageous to the *cestui que trust*. A transaction between trustee and *cestui que trust* will not be sustained if the trustee has taken advantage of any information received by him in such capacity, nor if the *cestui que trust* entered into the transaction in ignorance of his legal rights. *Saunders v. Richard*, 85 Fla. 28 (16 So. Rep. 679). An attorney representing the heirs of an estate, may purchase their interest in the real estate, provided the transaction is without concealment or fraud on his part. *Mitchell v. Colby*, Ia. (68 N. W. Rep. 769). A purchase by the attorney of a mortgagor at a sale under the mortgage, after he has given notice to the mortgagor's agent of his intention to do so, is not voidable after being acquiesced in by the mortgagor for fifteen years. *Herr v. Payson*, 157 Ill. 244 (41 N. E. Rep. 732). A purchase by one occupying a trust relation is not void but voidable. *Herr v. Payson*, 157

Ill. 244 (41 N. E. Rep. 732). Where one who is an attorney of parties who occupy a trust relation takes an assignment of the interest of one of such parties he takes the same subject to the trust. *Fellows v. Loomis*, 170 Pa. 415 (33 Atl. Rep. 266). Upon this subject, see Executors and administrators; Real estate agent—Fiduciary relations. The conveyance by a trustee to one having notice of the trust passes no greater right to the grantee than the trustee had. *Walston v. Smith*, 67 Vt. 542 (32 Atl. Rep. 486).

Sec. 849. Dealing with trust estate—Agents and trustees of corporations. In a recent case the supreme court of Virginia say: "It is settled law that an agent employed to purchase or to sell, or to act in any other business, will not be permitted to make profits for himself out of the transaction, and that profits so derived inure to the benefit of the principal. And this rule of law applies equally to the promoters of a corporation who occupy, like agents, fiduciary relations to the new company. It may be stated as a general principle that in all cases where a person is either actually or constructively an agent for another all profits and advantages made or contracted for by him in the business beyond the ordinary compensation to be paid him by his principal are for the benefit of his principal. Story, Ag. (8th Ed.) § 211; 2 Pom. Eq. Jur., § 959; 1 Beach, Priv. Corp., § 237. These principles are specially applicable to corporations, which can only act by trustees or agents. The great number of corporations, the enormous amount of wealth invested in them, and placed under the control and management of agents and trustees, strongly demand of courts of justice a firm adherence to these principles and a rigid application of them to every case coming within their operation." *Central Land Co. v. Obenchain*, 92 Va. 130 (22 S. E. Rep. 876).

Sec. 850. Powers of courts over express trusts. A court of equity will not allow an express trust to fail for the want of a trustee. *Ewing v. Walker*, 60 Ark. 503 (31 S. W. Rep. 45). Citing, 2 Pom. Eq. Jur., § 1007; Tied. Eq. Jur., § 313, and authorities cited; 1 Perry, Trusts, § 38; *Furman v. Fisher*, 4 Cold. 626 (94 Am. Dec. 210); *Field v. Arrowsmith*, 3 Humph. 446 (30 Am. Dec. 185); *Heights Co. v.*

Oettinger, 58 Md. 46; *Adams v. Adams*, 21 Wall. 185; *Ey-
rick v. Hetrick*, 18 Pa. St. 488. Courts of equity have power
to transfer trust estates from trustees in one state to trustees in
another. *Linton v. Shaw*, 95 Ga. 688 (22 S. E. Rep. 698).
A court cannot control, or compel the exercise of, a discre-
tionary power given to trustees. *Dillard v. Dillard's Ex'rs*,
Va. (21 S. E. Rep. 669). Where an estate is devised
to trustees, the income to be used for the maintenance and
education of the testator's minor children, the court has no
power to order the trustee to raise money to execute the trust
by mortgaging the premises. *Famison v. McWhorter*, 7
Houst. (Del.) 242 (81 Atl. Rep. 517). Where a testament-
ary trustee has no power under the will to sell or incumber
land, an order of court authorizing such sale or incumbrance is
void unless the beneficiaries of the trust are made parties to
the proceeding. *Sampson v. Mitchell*, 125 Mo. 217 (28 S.
W. Rep. 768). New York Rev. Stat., p. 780, § 65, as amend-
ed by Laws 1886, Ch. 257, relating to trusts, and providing
that the supreme court may authorize a trustee to mortgage or
sell land held under an express trust for the purpose of pre-
serving or improving the trust estate, confers no power on
such court to authorize the trustee of land for a life tenant to
bind the interest of infant remaindermen by mortgage, even
with the consent of their guardian *ad litem*. An order direct-
ing the trustee of a life tenant to mortgage the real estate of
infant remaindermen may be collaterally assailed, for want of
jurisdiction, in a proceeding to foreclose such mortgage.
Losey v. Stanley, 147 N. Y. 560 (42 N. E. Rep. 8). Massa-
chusetts Gen. Stat., Ch. 100, § 15, is as follows: "When a
person seised or possessed of real or personal estate, or of an
interest therein, upon a trust, express or implied, is under the
age of twenty-one years, insane, out of the commonwealth, or
not amenable to the process of any court therein, which has
equity powers and when in the opinion of the supreme judicial
court or of a probate court it is fit that a sale should be made
of such estate, or of an interest therein, or that a conveyance
or transfer should be made thereof in order to carry into effect
the objects of the trust, the court may by decree direct such
sale, conveyance, or transfer to be made and may appoint
some suitable person in the place of such trustee to sell, con-

vey, or transfer the same in such manner as it may require. If a person so seised or possessed of an estate or entitled thereto upon a trust, is within the jurisdiction of the court, he or his guardian may be ordered to make such conveyances as the court may deem proper." It is held that in order for a plaintiff to avail himself of this statute in an action for specific performance he must have an equitable title to the land. It does not apply to a case where there is simply an agreement to purchase and nothing more. *Merrill v. Beckwith*, 165 Mass. 508 (40 N. E. Rep. 855).

Sec. 851. Termination of trusts. Where a trustee is empowered when the beneficiaries come of age to sell the land and pay them the proceeds, and instead of doing so conveys the land direct to the beneficiaries, the trust is ended. *Gibson v. Gains*, Ky. (28 S. W. Rep. 781). Where land is held in trust for the payment of debts, the taking of a new note with personal security does not discharge the trust. *Holden v. Strickland*, 116 N. C. 185 (21 S. E. Rep. 684). It is held that in a proceeding in chancery to terminate a trust a court will not decree that a deed which is in its terms one of trust conveys a fee simple, unless the case is so clear that a purchaser of the land by contract would be decreed to accept title on a bill for specific performance. *Martling v. Martling*, N. J. Eq. (30 Atl. Rep. 27).

VENDOR AND VENDEE.

EPITOME OF CASES.

Sec. 852. As to what constitutes a land contract. To constitute a contract of sale there must be a meeting of minds at the same time. An offer without more is an offer in the present to be accepted or refused when made. Until it is accepted it may be withdrawn though that be at the next instant after it is made and a subsequent acceptance will be of no avail. *Vincent v. Woodland Oil Co.*, Pa. St. (30

Atl. Rep. 991). In order that an offer and acceptance may constitute a contract, the acceptance must be unqualified. *De Jonge v. Hunt*, 103 Mich. 94 (61 N. W. Rep. 841). One who would avail himself of the benefits of an option to buy must comply with its terms. *Berwind v. Williams*, Pa. St.

(33 Atl. Rep. 353). Where the land contract provides for a conveyance on or before a given date the option is with the vendor and not with the vendee. *Vittum v. Estey*, 67 Vt. 158 (31 Atl. Rep. 144).

Sec. 853. Bond for title. The obligee in a bond for titles, who has paid a part of the purchase money for the lands to which the bond relates, may, when sued by the maker of the bond upon a note given for the balance, recoup his damages resulting from a breach of the bond, notwithstanding he retains possession of the land, he having at the maturity of the note offered to pay the same, and demanded compliance with the terms of the bond, and by his plea offering to surrender possession and to account for rents during the time of his occupation of the premises. If the obligor in a bond for titles, after delivering the land to the obligee, enters upon the same, and wrongfully appropriates wood or timber which formed a part of the consideration of a note given for the purchase money of the premises, the obligee, when sued upon the note, may waive the tort, and set off in the action the value of the wood or timber so taken and appropriated. Profits which the obligee in a bond for titles would have made on a contract which he, at the time the bond was executed, had agreed upon for a sale of the premises to a third person, are not recoverable in an action upon the bond or in a plea of recoupment, unless the obligor had notice of such contract at the time of executing the bond, or certainly not unless notice came to him before he made any breach of its condition. *Sanderlin v. Willis*, 94 Ga. 171 (21 S. E. Rep. 291). Where a bond for a deed recites the execution of certain notes by the vendee, which notes, through inadvertence, were not executed, equity will enforce the liability against the vendee the same as if they were executed. *Block v. Smith*, 61 Ark. 266 (32 S. W. Rep. 1070).

Sec. 854. Construction of land contracts—Assignments. Where the title to the land sold can only be obtained through the proceedings in the probate court, of which fact both parties had knowledge, both will be deemed to have contemplated that such proceedings were to be had, and that the sale was to be made substantially in the manner prescribed by law. *McAlpine v. Reicheneker*, 58 Kan. 100 (42 Pac. Rep. 839). When a vendor agrees to convey land at a future time, with covenants of warranty, and in pursuance of the terms of the agreement places the purchaser in possession, assessments for street and sewer improvements made after the execution of the contract, but before the execution of the deed, are not incumbrances within the meaning of the contract. *Carey v. Gundelfinger*, 12 Ind. App. 645 (40 N. E. Rep. 1112). Where a contract for the purchase of land provides that, on performance of the contract by the vendee, the vendor will, on request and "surrender of the contract," execute a deed, an assignee of a mortgage given on the land by the vendee allowing the mortgagee at maturity to pay all liens on the land is entitled to a deed from the vendor on tender of any balance due on the price, without offering to surrender the contract. *Central Pac. R. Co. v. Deetz*, 109 Cal. 627 (42 Pac. Rep. 235). For construction of contracts depending upon particular facts, see, *Torrence v. Shedd*, 156 Ill. 194 (41 N. E. Rep. 95; 42 N. E. Rep. 171); *Gray v. Hill*, Mich. (63 N. W. Rep. 77); *Southern Pac. R. Co. v. Allen*, Cal. (40 Pac. Rep. 752); *Jewell v. Norris*, Ia. (62 N. W. Rep. 740). A vendee of real estate is presumed to acquire all actions appurtenant to the property and necessary to its perfect enjoyment; but, as to damages actually suffered by the vendor before the sale, they are personal to him, and cannot be recovered by the purchaser without an express transfer. *Bradford v. Richard*, 46 La. 1530 (16 So. Rep. 487). The assignment of a land contract carries with it whatever rights the assignee may have thereunder. *Hooper v. Van Husen*, Mich. (63 N. W. Rep. 522).

Sec. 855. As to when a deed will be treated as an executory contract to convey — Rescission for fraud. Where a vendor, without fraudulent intention, represents that

he holds the fee simple title in certain lands which he agrees to convey to his vendee but instead of doing so conveys other lands by warranty deed to which he has no title, equity will treat such deed as an executory contract to convey, the rescission of which may be decreed. *Adams v. Reed*, 11 Utah, 480 (40 Pac. Rep. 720). The court say: "We believe the rule to be well settled that material representations which are untrue, though innocently made, or the concealment of material facts by mistake or inadvertence, when relied on and which have become the foundation of the active relations between the parties, operate as a 'surprise and imposition,' and constitute such fraud as will move a court of equity to decree a rescission of an executory contract. 1 Story, Eq., § 193; 1 Beach, Eq. Jur., §§ 69, 93; Bish., Cont., § 662; Clark, Cont., p. 339; 2 Pom., Eq. Jur., §§ 883, 887, 889; *Derry v. Peek*, 14 App. Cas. 337; *Arkwright v. Newbold*, 17 Ch. Div. 320; *Traill v. Baring*, 4 De Gex, J. & S. 318; *Shipp v. Crosskill*, L. R. 10 Eq. 73; Cooley, Torts (2d Ed.), p. 582; *Hexten v. Bast*, 125 Pa. St. 52 (17 Atl. Rep. 252); *Furnace Co. v. Moffatt*, 147 Mass. 403 (18 N. E. Rep. 168); *Wells v. McGoch*, 71 Wis. 196 (35 N. W. Rep. 769); *De Frees v. Carr*, 8 Utah 160 (33 Pac. Rep. 217); *Cotzhausen v. Simon*, 47 Wis. 106 (1 N. W. Rep. 473); *Grant v. Law*, 29 Wis. 99; *Knowlton v. Amy*, 47 Mich. 204 (10 N. W. Rep. 201); *Bullitt v. Farrar*, 42 Minn. 8 (43 N. W. Rep. 566; 18 Am. St. Rep. 485); *Litchfield v. Hutchinson*, 117 Mass. 195; *Smith v. Richards*, 13 Pet. 26; 2 Warv. Vend., § 18. 'As a rule, all representations which are untrue, and which materially affect the value of the property which forms the subject of the contract will furnish grounds for a rescission, even though they may have been made without fraudulent intent.' 2 Warv. Vend., § 18; *Allen v. Hart*, 72 Ill. 104; *Bennett v. Judson*, 21 N. Y. 238; *Mulvey v. King*, 39 Ohio St. 491; *Wilcox v. University*, 32 Iowa 369; *Alvarez v. Brannan*, 7 Cal. 503; (68 Am. Dec. 274)." See Contracts—Fraud.

Sec. 856. Waiver of provisions in land contract. Where the vendor of land agrees to furnish the vendee an abstract of title within thirty days from the date of the sale, which is not done, and the vendee afterwards treats the

default as immaterial, and continues to make payments under the contract, and otherwise treats it as still in force, he will be deemed to have waived the performance of that condition, and cannot obtain a rescission, or a recovery of the money advanced, by reason of such default. *McAlpine v. Reichenker*, 56 Kan. 100 (42 Pac. Rep. 839). It is held that where a contract for the sale of land provided that the deed should be executed and the consideration paid on the construction of a switch track to the land by a railroad company which was not a party to the contract, the vendee after accepting a deed under the contract cannot refuse to pay the consideration on the ground that the switch track has not been built. *McCloy v. Cox*, 12 Ind. App. 27 (39 N. E. Rep. 901).

Sec. 857. Renunciation of contracts. Where a party to a land contract repudiates the entire contract, or a part of it that goes to the whole consideration, and declares that he will no longer be bound by it, the other party may, if he pleases, act upon the declaration, and treat the contract as thereby broken and at an end for all purposes except the bringing of a suit upon it, which he may bring at once, without waiting for the time of performance. But declarations that do not amount to an absolute and unequivocal refusal to perform the contract cannot be treated as a renunciation of it. *Vittum v. Estey*, 67 Vt. 158 (81 Atl. Rep. 144). Where a vendee in a land contract surrenders his contract to the vendor and the same is accepted, the release of the vendor from the obligations of the contract is a sufficient consideration to support the surrender. *Kvello v. Taylor*, N. Dak. (63 N. W. Rep. 889).

Sec. 858. Abandonment — Earnest money — Forfeiture. Where one who has entered into an executory contract to convey land at a future date, and prior to such date conveys it to a third person, the other party to the contract is not entitled to treat the contract as abandoned before the time of its performance arrives. One may sell land which he does not own and will be able when the time of performance arrives to furnish a good title. *Garberino v. Roberts*, 109 Cal. 125 (41 Pac. Rep. 857). Where a purchaser of land deposits a specified sum as earnest money to be forfeited as liquidated dam-

ages in case he fails to fulfill his contract, upon the completion of the contract by the vendor a court of equity will enforce his title to the earnest money not on the ground of forfeiture but on the ground of compensation. *Bucklen v. Hasterlik*, 155 Ill. 428 (40 N. E. Rep. 561). Where the contract between the vendor and vendee provides for a forfeiture upon nonperformance of the vendee and his silence as to the recovery of payments made prior to such forfeiture, the forfeiture will include not only the contract but the payments made thereunder. *Reddish v. Smith*, 10 Wash. St. 178 (38 Pac. Rep. 1008; 45 Am. St. Rep. 781). It is held that a contract for the sale of land providing that, if the vendee failed to pay the price or the interest thereon within a time specified, the vendor could rescind the contract, and that all improvements and payments made by the vendee should thereupon be forfeited, is a contract of conditional sale, and, in the absence of fraud, cannot be construed as an equitable mortgage, so as to relieve the vendee from forfeiture or rescission by the vendor for default in payment of interest. *Pease v. Baxter*, 12 Wash. St. 576 (41 Pac. Rep. 899).

Sec. 859. Diminution in quantity of land. Where land is sold by the tract or lot and not by the foot, the quantity named in the deed does not necessarily control but will give way to boundary lines which will also in some instances give way to fixed and visible monuments. *Richwine v. Jones*, 140 Ind. 289 (39 N. E. Rep. 460). Where, in a conveyance of all of a certain survey less a given amount previously surveyed, a statement of a number of acres as contained in the survey is made evidently for the purpose of identifying the survey, it does not constitute a warranty as to the quantity. *Stuart v. Stamper*, Ky. (32 S. W. Rep. 258). Notwithstanding a sale is *per aversionem*, and not, on that account, entitling the purchaser to any restitution of price on account of diminution in quantity of land received, yet a different question arises when, on trial, the fact is disclosed that there is a break in one of the boundaries. In such case the purchaser is entitled to go to the boundary, and if he cannot he has a legal claim for the deficiency in quantity. *Guglielmi v. Geismer*, 47 La. 147 (16 So. Rep. 742). As to when a

vendee is entitled to an abatement of price on account of a mistake in the quantity of land, see, *Drake v. Eubanks*, 61 Ark. 120 (82 S. W. Rep. 492).

Sec. 860. Good and marketable title. Right of vendee to refuse doubtful title. A vendee cannot be compelled to accept a title upon which a claim rests, and which threatens him with serious litigation in the future. *Lyman v. Stroudbach*, 47 La. 71 (16 So. Rep. 662). The mere possibility of the existence of an outstanding charge upon the land decreed to be sold will not render the title unmarketable. *Morgan v. Glendy*, 92 Va. 86 (22 S. E. Rep. 854.) A purchaser from an administrator was held justified in refusing to complete his purchase on account of the title not being "satisfactory," there being decisions to justify him in so refusing. *Green v. Russell*, 103 Mich. 638 (61 N. W. Rep. 885). In order to justify a vendee in refusing to accept the title of his vendor on the ground of its doubtful validity the doubt must be a reasonable one. *Levy v. Iroquois Bldg. Co.*, 80 Md. 300 (30 Atl. Rep. 707). A doubtful title or one which exposes the holder of it to litigation is not marketable and the rule in equity is that a purchaser will not be compelled to accept it, unless it can be shown to be good beyond a reasonable doubt. *Holmes v. Woods*, 168 Pa. St. 530 (32 Atl. Rep. 54). Ordinarily a purchaser will not be required to accept a conveyance subject to unsatisfied mortgages or incumbrances even though he is permitted to deduct an equivalent from the purchase-money; but the rule is different where the purchaser waives the satisfying of the mortgages and they are kept in existence at his instance. *Webster v. Kings Co. Trust Co.*, 145 N. Y. 275 (39 N. E. Rep. 964). Where the contract between vendor and vendee calls for a "good" title, the vendee is entitled to a title that is "marketable" as well as good in fact. He is not bound to accept a title which is so doubtful as to be unmarketable, and the rule is the same whether the action is one brought by the vendor to compel specific performance or by the vendee to recover back his earnest money. But a title is not unmarketable, within the meaning of this rule, where no question of fact is involved, but only one of law, arising exclusively upon the construction of a record muniment of title, and all parties in

interest are before the court, so that its decision will be a final determination of the matter. Hence a doubt as to the construction of a decree of distribution by a probate court, which is conclusive upon all parties interested in the estate, will not render a title unmarketable within the meaning of the rule. *Ladd v. Weiskopf*, 62 Minn. 29 (64 N. W. Rep. 99). In a case which reviews the authorities it is held that where a husband and wife are appointed joint executors of a will with power of sale of real estate and the husband is disqualified on account of being a subscribing witness to the execution of the power by the wife who tenders a deed in which her husband joins, does not present such a doubtful title as will prevent the enforcement of an action for specific performance against the vendee. *Lippincott v. Wikoff*, N. J. Eq. (88 Atl. Rep. 805).

Sec. 861. Purchase-money—As to when action for will lie. One who has made a contract for the sale and conveyance of land, the agreed purchaser never having entered into possession nor taken a conveyance, has his election of two remedies, if the contract be binding upon the other party. He may either proceed by an equitable action for specific performance, or bring an action at law for damages for breach of the contract. But so long as the title is in himself, although he may have tendered a conveyance, he cannot maintain an action for the purchase money, or for a balance of the same, when some of it has been paid. *Reed v. Dougherty*, 94 Ga. 661 (20 S. E. Rep. 965).

Sec. 862. Right to sue for purchase-money—Previous conveyance of equity—Tender of deed. Where a vendor sold real estate and received from his vendee two promissory notes, due in one and two years and at the same time executed and delivered to his vendee a bond for a deed, binding himself or his assigns to convey the land to his vendee upon full payment of the purchase-money according to the terms of the notes which bond was duly recorded, and about the time of the maturity of the last note, no action having been brought on either of the notes, the vendor without tendering a deed of conveyance to the first vendee, sold and quit-claimed the land to a second vendee, who prior to the com-

mencement of an action for the purchase-money, sold and conveyed the land to the first vendee, against whom the vendor brought suit upon the notes for the purchase price of the land. It was held that the vendor could not recover in such action; that his proper action was for specific performance of the contract and in which case he must either tender a conveyance before suit or be in such a position that he can be compelled by decree to perform his part of the contract; that the notes not having been sued on before their maturity, together with the bond became one indivisible contract, to be construed together as a single contract embracing mutual and dependent covenants. It was further held that the first grantee had the right to assume and act on the assumption that the vendor who transferred the land to a stranger without tendering a conveyance to the first vendee after the deed matured, intended thereby to abandon the contract and turn over to the second grantee all of his rights and obligations growing out of the land contract and the trust relation created by it. *Shelly v. Mikkelson*, N. Dak. (63 N. W. Rep. 210). One who purchases land from a person in possession, who has no title, but who has made with the owner a parol contract to purchase (whether such second purchaser pays the vendor the agreed price or not), acquires no title and no equity as against the owner; but he can, after obtaining a conveyance from his immediate vendor, protect himself, as against any claim by the owner for purchase-money, if the latter executes and delivers a conveyance to his own immediate vendee. The mere execution, however, of such a conveyance, without completing a delivery thereof, will afford no protection. *Brown v. Story*, 94 Ga. 288 (21 S. E. Rep. 522).

Sec. 863. Notes maturing at different times—Proceedings when part only are due. In a recent case the supreme court of Georgia say: "The vendor of land who retains the title, giving the purchaser a bond for titles, and taking his promissory notes for the purchase money, maturing at different times in the future, is entitled to enforce against the land itself the collection of the purchase-money notes, irrespective of the solvency or insolvency of the maker. *Hawkins v. Dearing*, 98 Ga. 108 (19 S. E. Rep. 717). Where

only one of the notes has matured and been reduced to judgment, the vendor could file in the clerk's office a deed conveying the land to the vendee, and then proceed to sell the land under the judgment. Out of the proceeds of the sale, the judgment would first be satisfied; and, as to the surplus, the claim of the vendor for the balance of his unpaid purchase-money would undoubtedly be superior to the claims of all other creditors of the vendee. Code, §§ 8586, 8654. As to any of the remaining purchase-money notes which had not matured at the time of the sale, the remedy of the vendor by such sale would not be entirely adequate for his protection. Consequently, he would need the aid of a court of competent jurisdiction in order to have the surplus impounded and applied to the satisfaction of such of the remaining notes as had already matured, and to the others as they become due. A vendor in the position indicated has no right to collect his money upon any of the notes before their maturity, but he may maintain an equitable action in the superior court for the purpose of obtaining a decree for the sale of the land and for holding up the surplus proceeds, above the amount necessary to discharge the matured notes, in order that the same may be applied to the others as they mature." *Brown v. Farmer*, 94 Ga. 178 (28 S. W. Rep. 292).

Sec. 864. Purchase money—Action for—Defense of set off on account of incumbrances bought in. It is held that a purchaser under covenant of warranty who buys in an outstanding right of dower cannot offset the amount he pays therefor in an action by the vendor for the purchase-money without proof that the existence of the dower damaged the title to the extent of the sum paid to buy it in. *McCord v. Massey*, 155 Ill. 123 (39 N. E. Rep. 592). The court say: "A right of dower is an incumbrance within the terms of that covenant, and it is immaterial whether that right of dower is inchoate or consummate. *Russ v. Perry*, 49 N. H. 547; *Carter v. Denman's Ex'rs*, 28 N. J. L. 260; *Porter v. Noyer*, 2 Greenl. 22 (11 Am. Dec. 80); *Jones v. Gardner*, 10 Johns. 266; *Prescott v. Trueman*, 4 Mass. 627 (3 Am. Dec. 246); *Walker's Adm'r v. Deaver*, 79 Mo. 664; *Bigelow v. Hubbard*, 97 Mass. 195; *Shearer v. Ranger*, 22 Pick. 447. A right

exists in the covenantee to remove an incumbrance where it is certain in amount, and he may pay off and discharge the same; and where he does so, and his deed contains a covenant against incumbrances, he may set off such sum as it was fairly and reasonably necessary to pay for such purpose against the amount due for the purchase-money of the premises. *Grant v. Tallman*, 20 N. Y. 191 (75 Am. Dec. 384); *Willetts v. Burgess*, 84 Ill. 494; *Sargeant v. Kellogg*, 5 Gilman 273; *Edwards v. Todd*, 1 Scam. 462; *Bridge Co. v. Shannon*, 1 Gilman 15; *Nichols v. Ruckells*, 8 Scam. 298. While there is some conflict in the decisions of the various states on the question as to whether the right of recovery or set off by a grantee with covenants against incumbrances in his deed exists to the sum actually paid by him, the great weight of authority sustains the view that the burden of proof is on such grantee, not only to show the amount paid, but that such amount was the reasonable and fair value of the interest acquired. *Grant v. Tallman*, 20 N. Y. 191 (75 Am. Dec. 384); *Guthrie v. Russell*, 46 Ia. 269 (26 Am. Rep. 135); *Farnum v. Peterson*, 111 Mass. 148; *City of St. Louis v. Bissell*, 46 Mo. 157; *Anderson v. Knox*, 20 Ala. 156; *Pate v. Mitchell*, 28 Ark. 590 (79 Am. Dec. 114); Dev. Deeds, §§ 918, 919. A limitation always exists, however, as to the amount recoverable for a breach of the covenant against incumbrances, as the amount recoverable is never allowed to exceed the amount of the purchase-money with interest thereon. *Willetts v. Burgess*, 84 Ill. 494; *Brady v. Spruck*, 27 Ill. 478."

Sec. 865. Purchase-money—Defective title as a defense to action for. Where a vendee would escape the payment of purchase-money, either in whole or part, because of a defective title, he must show by at least a preponderance of testimony that such defect clearly exists. *Bowman v. Duling*, 39 W. Va. 619 (20 S. E. Rep. 567). A vendee out of possession is not liable for the purchase price when it is shown that the vendor is without title. *Mims v. Cobbs*, Ala.

(18 So. Rep. 309). One who has conveyed land the title of which has never been divested from the state cannot maintain an action for the purchase price; and in such a suit the grantee is entitled to have his notes given as part of the

purchase price, in the hands of one with notice of the defect of title, cancelled and also recover any money paid. *Lamb v. Jones*, 87 Tex. 485 (29 S. W. Rep. 647). A grantee in possession under a general "warranty," which by the statute is made equivalent to the separate covenants in use under the common law, his grantor being alive and solvent, cannot defend in an action for the purchase money, solely on the ground that the deeds of remote grantors prohibited the sale of liquors on the premises. *Smith v. Jones*, Ky. (81 S. W. Rep. 475). In an action to recover purchase money the contract will not be rescinded on account of a defect in the title if a perfect title be tendered by the grantor before a decree is rendered, unless it appear to the court that the grantee has sustained some loss, injury, or damage by reason of the delay in perfecting the title. *Bradtfeldt v. Cooke*, 27 Ore. 194 (40 Pac. Rep. 1; 50 Am. St. Rep. 701). Citing, *Kimball v. West*, 15 Wall. 377; *Mays v. Swope*, 8 Grat. 46; *Hughes v. McNider*, 90 N. C. 248. In case of a foreclosure of a mortgage given for purchase-money the mortgagor may claim a deduction on account of the failure of title as to part of the premises conveyed. *Rockwell v. Wells*, 104 Mich. 57 (62 N. W. Rep. 165). When the payment of purchase money is to be made when "acreage of good title" is determined, the vendee need not wait for eviction but may defend suit for purchase-money by showing want of title in grantor, and the vendor will not be permitted to avail himself of the fact that the vendee had or has acquired the superior title. *American Ass'n v. Short*, Ky. (80 S. W. Rep. 978).

Sec. 866. Invalid sale—Recovery of purchase-money. Where a county board offers for sale the public property of the county, claiming as authority for such action the consent of a majority of the electors, expressed at a general election, a purchaser at such sale, in an action to recover the price paid (the sale having been adjudged void for want of authority), will not be chargeable with constructive notice of the fact that the proposition to sell was in fact defeated. In order to defeat an action for the recovery of money voluntarily paid under a mistake of fact it is not sufficient that the plaintiff might have known the facts had he availed himself of all of

the means of knowledge at his command. *Douglas Co. v. Keller*, 48 Neb. 635 (62 N. W. Rep. 60).

Sec. 867. Vendor's lien — As to when permitted — Priorities as to crops. The grantor's lien wherever recognized is only permitted as a security for the unpaid purchase-money and not for any other indebtedness or liability. There must be a certain, ascertained, absolute debt owing for the purchase price. The lien does not exist in behalf of any uncertain, contingent or unliquidated demand. *Gard v. Gard*, 108 Cal. 19 (40 Pac. Rep. 1059). In a well considered case the authorities are reviewed and it is held that where the vendor reserves in the deed a lien on the future crops to secure payment of purchase-money, such lien is valid and entitled to preference over a subsequent mortgage of the crops by the vendee to one who had actual notice of the lien. *Martin v. Schichtl*, 60 Ark. 595 (31 S. W. Rep. 458). Where it is arranged between the vendor and the vendee that a note for the purchase-money shall be made payable to a creditor of the vendor, the lien is created in favor of the creditor. *Zwingle v. Wilkinson*, 94 Tenn. 246 (28 S. W. Rep. 1096). Where a deed recites that the consideration has been paid and is executed for the purpose of enabling the grantee, who is also a part owner of the premises, to make a sale of the whole of the property, a vendor's lien cannot be enforced in favor of the vendor. *Scheerer v. Agee*, Ala. (17 So. Rep. 610). When one conveys his property to another for the purpose of covering it up and thereby to hinder, delay and defraud his creditors, a vendor's lien cannot arise out of such transaction enforceable in equity. *Glover v. Walker*, Ala. (18 So. Rep. 251).

Sec. 868. Assignment of liens—Priorities. In a well considered case the authorities are reviewed and it is held that the vendor or mortgagee may by contract, in writing or parol, assign the whole or any part of the mortgage or vendor's lien to secure any part of the notes assigned, whether they be the first or last maturing or the intermediate notes of a series; and the different assignees of the several notes of a series secured by a vendor's lien, in the absence of a different agreement, share *pro rata* in the proceeds of a sale of the land to pay the notes.

The assignment of one of a series of notes secured by a vendor's lien, in connection with a contract giving the assignee a prior lien, vests in the assignee an equity superior to that of a subsequent assignee of other notes of the series who purchased for value, and without notice of the prior assignment; the subsequent assignee being chargeable with such notice. *Nashville Trust Co. v. Smythe*, 94 Tenn. 513 (29 S. W. Rep. 903; 45 Am. St. Rep. 748; 27 L. R. A. 663). In Texas it is held that where a note given for the purchase money is assigned by the vendor who has retained a vendor's lien and such note becomes barred by the statute of limitations and the vendor subsequently conveys his interest in the land to the assignee of the note, such assignee may enforce the lien and recover the land. *White v. Cole*, 87 Tex. 500 (29 S. W. Rep. 759). The Arkansas statute, Mansf. Dig., § 474, provides that the lien retained in the face of a deed becomes the security for the payment of purchase money notes and passes to the assignee thereof. It is held that the enforcement of this lien by a *bona fide* purchaser of the notes is not affected by the secret equities between the grantor and grantee. *Pullen v. Ward*, 60 Ark. 90 (28 S. W. Rep. 1084).

Sec. 869. Enforcement of the lien—Practice. The beneficiaries of a contract under which the right of a vendor's lien is acquired, although not parties to the contract, may enforce the lien. *Whetstone v. Baker*, 140 Ind. 213 (39 N. E. Rep. 868). The wife of a purchaser is not a proper party to an action to enforce a vendor's lien. *Mutual Bldg. & L. Ass'n v. Wyeth*, 105 Ala. 639 (17 So. Rep. 45). One who brings a suit to foreclose a mortgage alleged to have been given for purchase money but fails because it is shown that the mortgage was never delivered, is not entitled to a decree enforcing a vendor's lien. *Baker v. Updike*, 155 Ill. 54 (39 N. E. Rep. 587). Where a purchase money mortgage is adjudged void a vendor's lien may be enforced. *Mutual Bldg & L. Ass'n v. Wyeth*, 105 Ala. 639 (17 So. Rep. 45).

Sec. 870. Loss or waiver of vendor's lien. A vendor's lien may be lost by a subsequent collateral contract by which the payment of the purchase money is made uncertain as to time and amount. *Gard v. Gard*, 108 Cal. 19 (40 Pac.

Rep. 1059). It is not lost by a recital in the deed that the purchase money is paid when in fact it has not been paid. *Zwingle v. Wilkinson*, 94 Tenn. 246 (28 S. W. Rep. 1096). Land is not chargeable with a vendor's lien which has been conveyed by a subsequent purchaser for value without notice of the existence of the lien. *Bang v. Brett*, 62 Minn. 4 (63 N. W. Rep. 1067). Where the waiver of a vendor's lien has been obtained by any kind of fraud its priority may be asserted. *Hooper v. Central Trust Co.*, 81 Md. 559 (32 Atl. Rep. 505; 29 L. R. A. 262). A vendor's lien is waived by the taking of a deed of trust or mortgage to secure the unpaid purchase price; and when waived in this manner it is revived by a subsequent vendee of the mortgagor assuming and agreeing to pay the mortgage debt. *Winner v. Lippincott Inv. Co.*, 125 Mo. 528 (28 S. W. Rep. 998).

Sec. 871. Vendor's lien — Statute of limitations — Effect of renewal of note for purchase money. The Miss. Code, 1892, § 2755, provides that "the completion of the period of limitation herein prescribed to bar any action, shall defeat and extinguish the right as well as the remedy; but the former legal obligation shall be a sufficient consideration to uphold a new promise based thereon." Under this statute it is held that where a vendor's lien which has been retained is barred by the statute of limitations, the giving of a new note in lieu thereof which recites that it is given for the purchase price of the land on which a vendor's lien is retained and in lieu thereof, does not revive the lien. *Proctor v. Hart*, 72 Miss. 288 (16 So. Rep. 595). The court say: "The change wrought by this new statute is radical. Not only the remedy is denied, the action barred, but the right itself is extinguished upon the completion of the period of limitation. The remedy and the right, whatever it was, are alike destroyed. There remains nothing to revive. A new contract, evidenced by a new promise in writing may be made, and the former legal obligation may be sufficient consideration to uphold it, but it is no longer the revivifying of a right theretofore unenforceable by reason of a remedy being denied merely. It is a new contract, based upon the former legal liability and its consideration. It is the creation of a new right and a new remedy

for its enforcement. The extinguished right, the original debt and all its incidents, as well as the lost remedy, are all destroyed upon the completion of the period of limitations, under our present statute. The promissory note made by the appellant to the appellees, after the bar had attached, is clearly such a new promise as creates personal liability, but it does no more. It does not revive and restore a dead debt with all its incidents. It is only a new promise to pay a sum certain based upon a former legal obligation, without any creation of a new lien as security for payment. The mere recital that the purchase of certain lands was the consideration in the former legal obligation creates no new lien upon the lands. The purpose to do that must be evidenced as clearly as the new promise itself must be."

WASTE.

EPITOME OF CASES.

Sec. 872. What constitutes waste. Where the value of lands for the purpose for which they are best adapted is materially diminished by the cutting and selling of timber therefrom by a life tenant, such acts constitute waste. *Disher v. Dishar*, 45 Neb. 100 (68 N. W. Rep. 868). In discussing the subject of waste by a life tenant the court say: "It is not waste for a life tenant to cut wood or timber so as to fit the land for pasture or cultivation, provided he does not, in so doing, damage or diminish the value of the inheritance, and his acts are conformable to the rules of good husbandry, although the wood and timber so cut be sold or consumed off the premises. * * * It cannot be denied that the doctrine of the common law in relation to waste has been greatly relaxed in favor of the tenant. But the preventive jurisdiction of courts of equity by means of injunction is freely exercised in order to protect the reversioner against waste by the tenant in possession, when the threatened acts amount to a manifest injury to the inheritance and a wanton abuse of the

tenant's rights. 2 Story. Eq. Jur., § 915; High, Inj., § 432 *et seq.*; Wood, Landl. & Ten., § 54; 4 Kent Comm., 76 *et seq.*; 3 Pom. Eq. Jur., § 1348. The doctrine above stated is recognized in many reported cases, and is so well established as to be regarded elementary law."

Sec. 873. Injunctions to prevent—Practice. In an action brought by a purchaser of land at a foreclosure sale to enjoin waste by the tenant of another, the latter's lessor may intervene and show that he is the owner of the land. *Hendrick v. Tipton*, Ky. (80 S.W. Rep. 618). Waste by one in possession may be enjoined pending a suit to determine the title when it is necessary in order to prevent irremediable mischief or destruction. *Woods v. Riley*, 72 Miss. 73 (18 So. Rep. 384). In an action for injunction against waste, where the injury is irreparable, it is not essential that the applicant for the injunction should establish a clear title, but only that he should show a fair *prima facie* case in support of his title. *Rakes v. Rustin L. M. & Mfg Co.*, Va. (22 S. E. Rep. 498).

WATERS AND WATER COURSES.

EPITOME OF CASES.

Sec. 874. As to what is a water course. In a recent case the appellate court of Indiana say: "This court in *Board v. Castetter*, 7 Ind. App. 309 (33 N. E. Rep. 986; 34 N. E. Rep. 687), defined a water course as follows: 'The word "water course" is a broader and more comprehensive word than "river." In its most general sense it means a course or channel in which water flows. In its legal sense it consists of bed, banks, and water; a living stream confined in a channel, but not necessarily flowing all the time, for there are many water courses which are sometimes dry.' This definition, so far as it went, was approved by the supreme court of this state in *Board v. Wagner*, 130 Ind. 609 (38 N. E. Rep. 171), the court adding: 'The word "living" is here employed in the

sense of "permanent" or "continuous" as used in *Board v. Bailey*, 122 Ind. 46 (23 N. E. Rep. 672); and *Rice v. City of Evansville*, 108 Ind. 7 (9 N. E. Rep. 139; 58 Am. Rep. 22).'' *New York, C. & St. L. R. Co. v. Speelman*, 12 Ind. App. 872 (40 N. E. Rep. 541).

Sec. 875. As to what constitutes navigable waters. In the recent case of *Clark v. Cambridge & A. Irr. & Imp. Co.*, 45 Neb. 798 (64 N. W. Rep. 239), the supreme court of Nebraska say: "At common law, navigable streams are held to be those in which the tide ebbs and flows. 3 Kent Comm., 413, and note; Black, Pom. Water Rights, § 216. But the doctrine of the common law has not, as a rule, been accepted in this country, and has been entirely repudiated by the courts of the United States, in determining the jurisdiction of congress over lakes and streams, whether situated in two or more states, or within the boundaries of a single state. In those courts, navigability in law is synonymous with navigability in fact, without regard to the influence of the ocean tide, and includes those waters only which afford a channel for useful commerce. See *U. S. v. The Montello*, 20 Wall. 430; *Miller v. Mayor*, 109 U. S. 385 (3 Sup. Ct. Rep. 228). And, although the decisions of the state courts are not altogether harmonious, the rule stated is in accordance with the decided weight of authority." For collection of authorities on this subject, see Vol. 1, §§ 39, 40; Vol. 3, § 683.

Sec. 876. Nature of the estate in water rights—Descent of. The right to a certain amount of water power reserved by a state in a conveyance of a canal belonging to it may exist independent of any interest in the land, and may be leased by such state. *Columbia W. P. Co. v. Columbia Elec. St. Ry. L. & P. Co.*, 43 S. C. 154 (20 S. E. Rep. 1002). Where two water privileges on opposite sides of a stream were owned by one person, and the spent water from the mills on one side was discharged below the dam which fed the mills on the other side, the right to thus discharge the spent water continued, upon the owner's death, and the division of the estate, in the respective heirs in severalty. *Mason v. Horton*, 67 Vt. 266 (31 Atl. Rep. 291; 48 Am. St. Rep. 817).

Sec. 877. Property rights of riparian owners. The statute of Nebraska (Act Mar. 27, 1889, as amended in 1893) providing that "the right to the use of running water flowing in a river or stream or down a canyon or ravine, may be acquired by appropriation by any person or persons, company or corporation organized under the laws of the state of Nebraska, provided, that in all streams not more than twenty feet in width, the rights of riparian proprietors are not affected by the provisions of this act," in so far as it abolishes riparian rights in all streams over twenty feet in width is unconstitutional. *Clark v. Cambridge & A. Irr. & Imp. Co.*, 45 Neb. 798 (64 N. W. Rep. 239). The court say: "The right of a riparian proprietor, as such, is property, and, when vested, can be destroyed or impaired only in the interest of the general public, upon full compensation, and in accordance with established law. *Lux v. Haggin*, 69 Cal. 255 (10 Pac. Rep. 674); *Yates v. Milwaukee*, 10 Wall. 479; *Potomac Steamboat Co. v. Upper Potomac Steamboat Co.*, 109 U. S. 672 (3 Sup. Ct. Rep. 445, and 4 Sup. Ct. Rep. 15); *Delaplaine v. Railway Co.*, 42 Wis. 214 (24 Am. Rep. 386); *Bell v. Gough*, 23 N. J. L. 624; *Water Co. v. Raff*, 36 N. J. L. 335." Where a stream is not ordinarily navigable but has been made so by the construction of a dam by a riparian owner who uses the stream for the purpose of navigating a boat, his right to do so cannot be taken away from him by a municipality without compensation. *Stofflet v. Estes*, 104 Mich. 208 (62 N. W. Rep. 847).

Sec. 878. Mills and mill dams—Rights of flowage. If the person who originally erected the dam had, as against another, the right, without liability, to maintain the structure at a given height, such person had also the right to repair leaks in it, or rebuild in case it was washed away; and his successor in title acquired all his rights in the premises, and would not be liable in damages for exercising the same, either to the person against whom the original right existed, or his privies in estate. *Middlebrooks v. Mayne*, 96 Ga. 449 (23 S. E. Rep. 398). The right of flowage does not carry with it the exclusive right to control the use of the land for any other purpose. *Sullings v. Carter*, Mich. (63 N. W. Rep.

411). The right of flowage may be acquired by prescription. *Williams v. Barber*, 104 Mich. 31 (62 N. W. Rep. 155). Statutes authorizing the taking or flowage of land by compulsory process should be construed strictly, and whoever claims under them is confined to a clear and plain exercise of such powers as are expressly granted. *Geer v. Rockwell*, 65 Conn. 316 (32 Atl. Rep. 624).

Sec. 879. Navigable streams—Rights of loggers. Although a stream be navigable, the riparian owner who has by proper proceedings constructed a dam, has a right to maintain it, and the logger's right to floatage is subject to the proper use and protection of the dam. The maintenance and protection of the dam, cannot be said to be an interference with the logger's right or an obstruction to the navigation of the streams, and where without fault of either party there is a recent breach in the dam, the rights of both continue to be relative. The dam owner has the right to a reasonable time to repair the dam and its reasonable protection, and where the detention of the logs is necessary to such repair and protection, he has the right to a reasonable temporary detention for that purpose. Both parties must be reasonable in their demands. The navigator acquires no exclusive right by reason of an accident to the dam, and the dam owner must be reasonably prompt in repairing the dam, or if there be an opportunity to admit of the passage of the logs before the repairs can be made without serious injury to the dam, he should afford every reasonable facility for such passage. *Pratt v. Brown*, Mich. (64 N. W. Rep. 583). See Riparian owners—Public easement for floatage.

Sec. 880. Use of water — Diversion by riparian owner. "The rule is elementary that unless affected by license, grant, prescription, or public right, or the like, every proprietor of land on the bank of a stream of water whether navigable or not, has the right to use the water as it is wont to run, without material alteration or diminution; and no riparian owner has the right to use the water of the stream to the prejudice of other riparian owners, above or below him, by throwing it back upon the former, or subtracting it from the latter." Except for the purposes of navigation, or some other

public use, the state has no greater right than any other riparian owner. *Green Bay & M. Canal Co. v. Kaukauna Water-power Co.*, 90 Wis. 370 (61 N. W. Rep. 1121; 48 Am. St. Rep. 937; 28 L. R. A. 443). No action will lie for the diversion of water which overflows from a water course in time of an extraordinary flood. *Kansas City M. & B. R. Co. v. Smith*, 72 Miss. 677 (17 So. Rep. 78; 48 Am. St. Rep. 579; 27 L. R. A. 762). If a riparian proprietor by placing a dam across a stream running through his land, obstruct the same, so that instead of running on, as theretofore, to the riparian proprietor below, the water accumulates in an artificial lake or pond, and by means of percolation and evaporation is diminished in quantity to such an extent as to deprive the lower proprietor of the reasonable quantity of water to which he is entitled, and which he would otherwise receive, such obstruction of the stream operates as a diversion of the water, and for damages thus occasioned the lower proprietor is entitled to recover. If the diversion be complete, he is entitled to full damages; if partial, the damages should be apportioned. *White v. East Lake Land Co.*, 96 Ga. 415 (28 S. E. Rep. 393; 51 Am. St. Rep. 141). Although parties having separate interests in the water of a stream cannot unite in an action for damages for its past diversion, they may unite in an action to restrain future diversions. *Ronnow v. Delmue*, Nev. (41 Pac. Rep. 1074). An owner of land has the right to change the channel, and divert the water in a stream flowing through his land, providing that he returns the water to the original channel before it reaches the land of the proprietor below; and when an owner for the purpose of straightening a stream, cuts a ditch through his land, and over and along the highway, with the acquiescence and common consent of all, and turns the water of the stream therein, it will be governed by the same rules, in the manner of interference and obstruction, as a natural water course. *Missouri Pac. Ry. Co. v. Keys*, 55 Kan. 205 (40 Pac. Rep. 275; 49 Am. St. Rep. 249).

Sec. 881. Measure of damages for diversion of flowing water. It is held that in an action to recover damages occasioned by the diversion of a stream from a prospective mill site, reference must be had solely to the condition of the

estate and its use at the time of the diversion. *Southern Marble Co. v. Darnell*, 94 Ga. 281 (21 S. E. Rep. 531). The court say: "We think where a person goes upon a stream above the land of another, and diverts part of the water from his lands by means of a permanent ditch, which water would naturally have flowed upon his lands to the mill site, and which might have been used as a part of the water to operate the mill if one had been erected there, the proper measure of damages in such a case would either be the difference in the value of the land without the diverted water and its value with that water running to the mill site, or the like difference as to the value of the mill site itself. The owner would be entitled to recover one or the other of these differences at his election. Inasmuch as the owner had not erected a mill upon the site, nor done anything preparatory to its erection, his intention at the time the water was diverted, or at a previous or subsequent time, to erect a mill on the site in question, would make no difference as to the measure of damages. No mill having been erected, the anticipated profits arising from the running of a mill could not be recovered, and proof as to the probable extent of such profits was inadmissible." Where the injury is permanent the measure of damages is the diminution of value occasioned thereby, otherwise it is the depreciation of the value of the use of the land from the time of the injury to the bringing of the action. *Louisville, N. A. & C. Ry. Co. v. Sparks*, 12 Ind. App. 410 (40 N. E. Rep. 546).

WILLS.

EPITOME OF CASES.

Sec. 882. As to what is a will—Validity of devises. An instrument in writing, denominated on its face as the last will and testament, which purports to give no present interest in any property, but only the estate of which the makers die seised, signed by the parties, and delivered to the devisee therein named before the death of the makers, but which is not wit-

nessed nor subscribed by any person other than the makers, is without legal force, either as a conveyance *inter vivos* or a will. *Poore v. Poore*, 55 Kan. 687 (41 Pac. Rep. 973). A devise to one to hold in trust for W. B. M. & S., such real estate "to be holden upon condition that the fee simple in the same shall never be sold, but the same be built upon or continued to be used as a farm," is void so far as the quoted condition is concerned and vests a fee in W. B. M. & S. *Cushing v. Spalding*, 164 Mass. 287 (41 N. E. Rep. 297). Whatever the form of the instrument, if the obvious intention be that it shall serve no purpose and have no effect until after the death of the author, it is, at most, testamentary. *Conrad v. Douglas*, 59 Minn. 498 (61 N. W. Rep. 673). The annexation of a codicil to a will need not be physical provided the language of the codicil is sufficiently clear to identify the will referred to. *Pope v. Pope*, 95 Ga. 87 (22 S. E. Rep. 245). Two or more instruments, executed on the same day, may be probated as one will. *In re Murphy's Estate*, 104 Cal. 554 (38 Pac. Rep. 543). As to when a devise is void for remoteness. *Adams v. Farley*, Miss. (18 So. Rep. 390). The legal capacity of a corporation to take a devise of property the amount of which exceeds the limit prescribed in its charter cannot be assailed collaterally, and can only be taken advantage of by the state. *Hanson v. Little Sisters of the Poor*, 79 Md. 434 (32 Atl. Rep. 1052).

Sec. 883. Construction of—As to when a fee is devised. A devise to a wife of property "to be occupied and used by her and for a family home during her widowhood," does not create a fee simple estate during her widowhood. *Patton v. Church*, 168 Pa. 821 (31 Atl. Rep. 1079). Where a will making devises to E., D., L., and S., states expressly that the devise to E. is "in fee," and those to D., L., and S., are "for life," and further provides that, "should E., D., L., or S., die without issue, * * * the estate above given to them respectively for life shall go to such persons as it would go by law if they had an estate in fee and should die intestate," it is held that the last provision does not limit the estate devised to E. in fee. *Brisco v. Brisco*, Ky. (82 S. W. Rep. 212). A will devising land to a

daughter which provides that until she shall attain the age of twenty-five years she should have only the income therefrom, and after that time she should have the "full care, control, management and custody of said property, and the title thereof shall then vest in her," and should she die "leaving issue of her body, the remainder of said property shall pass and be vested absolutely and forever in such issue," but upon her dying without issue of her body the land should pass to and vest in another devisee, was held not to give the daughter a fee. *Healy v. Eastlake*, 152 Ill. 424 (89 N. E. Rep. 260). Under a statute (Wis. Rev. Stat., § 2278) providing that "every devise of land in any will shall be construed to convey all the estate of the devisor therein, which he could lawfully devise, unless it shall clearly appear by the will that the devisor intended to convey a less estate," it is held that a devise of the residue of the testator's property carries the fee simple of an undivided interest in land not otherwise disposed of. *Hiles v. Atlee*, 90 Wis. 72 (62 N. W. Rep. 940). Where a testator devises property to trustees and guardians of his son until he attains his majority, using the following language: "I give and bequeath to my son and only child all the rest of my estate, consisting of lands, slaves, cash, or cash notes, to be placed in the hands of his trustees and guardians for his benefit, hereby empowering them to invest any additional portion thereof in real estate as they shall think proper; and, should my son die leaving no issue, then and in that case the estate hereby bequeathed to him, whatever it may be, to come back and be divided among my brothers and sisters, or their issue," it is held that upon attaining his majority the son takes an absolute estate in the property, and that there can be no remainder over only in case of his death without issue before attaining his majority. *Jones v. Moore*, 96 Ky. 273 (28 S. W. Rep. 659). For cases depending upon particular facts see *in re Steinmetz's Estate*, 168 Pa. 171 (31 Atl. Rep. 1070); *McCallister v. Bethel*, Ky. (29 S. W. Rep. 745); *Lusby v. Taylor*, Ky. (30 S. W. Rep. 396).

Sec. 884. Construction of wills—Cases depending upon particular facts. An action to obtain a construction of a will cannot be predicted upon a state of facts which has

not yet arisen nor upon a matter which is future, contingent, and uncertain. *Wahl v. Brewer*, 80 Md. 237 (30 Atl. Rep. 654). At common law the phrase "leaving no issue," or "without leaving issue," when applied to a devise of land meant an indefinite failure of issue. *Patterson v. Madden*, N. J. Eq. (33 Atl. Rep. 51). Ill. Rev. Stat. 1893, Ch. 39, § 10, applied—rights of after-born children. *Salem Natl. Bk. v. White*, 159 Ill. 136 (42 N. E. Rep. 312). In construing Ia. Code, § 2453, which provides that a decedent's estate, "shall, in the absence of other arrangements by will, descend in equal shares to the children," a devise by a testator of all his property to a person not his child amounts to a disinheritance of his children. *Heeb v. Heeb*, Ia. (61 N. W. Rep. 932). Mass. Pub. Stat., Ch. 127, § 21, construed and applied—provision for unborn child. *Petition of Minot*, 164 Mass. 88 (41 N. E. Rep. 68). See, *In re Pepper's Estate*, 163 Pa. 304 (31 Atl. Rep. 100); *Benson v. Corbin*, 145 N. Y. 351 (40 N. E. Rep. 11). For construction of wills depending upon the particular facts of each case, see *In re Fisher*, R. I. (31 Atl. Rep. 579); *Lee v. Welch*, 163 Mass. 312 (39 N. E. Rep. 1112); *United States Trust Co. v. Black*, 146 N. Y. 1 (40 N. E. Rep. 403); *In re Bartlett*, 163 Mass. 509 (40 N. E. Rep. 899); *In re Seaman's Estate*, 147 N. Y. 69 (41 N. E. Rep. 401); *Dean v. Mumford*, 102 Mich. 510 (61 N. W. Rep. 7); *Sneer v. Stutz*, Ia. (61 N. W. Rep. 397); *Phillips v. Harrow*, Ia. (61 N. W. Rep. 434); *In re Heydenfeldt's Estate*, 106 Cal. 434 (39 Pac. Rep. 788); *Reed v. Davis*, 95 Ga. 202 (22 S. E. Rep. 140); *Dunford v. Jackson's Ex'rs*, Va. (22 S. E. Rep. 853). As to the nature of the estate devised, *Security Co. v. Cone*, 64 Conn. 579 (31 Atl. Rep. 7); *Grimes v. Shirk*, 169 Pa. 74 (32 Atl. Rep. 113); *Hoss v. Hoss*, 140 Ind. 551 (39 N. E. Rep. 255); *Hopkins v. Kent*, 145 N. Y. 368 (40 N. E. Rep. 4); *Rawley v. Sanns*, 141 Ind. 179 (40 N. E. Rep. 674); *Crawford v. Wearn*, 115 N. C. 540 (20 S. E. Rep. 724); *Fields v. Bush*, 94 Ga. 664 (21 S. E. Rep. 827); *New England Mort. Sec. Co. v. Gorgon*, 95 Ga. 781 (22 S. E. Rep. 706); *Hood v. Bramlett*, Ala. (17 So. Rep. 105); *Brand v. Rhodes*, Adm'r, Ky. (30 S. W. Rep. 597); *Blankenbaker v. Woodruff*, Ky. (30 S. W. Rep. 614); *Sanders v.*

Wade, Ky. (30 S. W. Rep. 656); *Moore v. Schindelhette*, 102 Mich. 612 (61 N. W. Rep. 62). As to charitable use—doctrine of cypres, *Attorney Gen. v. Briggs*, 164 Mass. 561 (42 N. E. Rep. 118). As to residuary clause, *In re Miner's Will*, 146 N. Y. 121 (40 N. E. Rep. 788). As to what is included in the term "legal heirs," *Griffin v. Ulen*, 189 Ind. 565 (39 N. E. Rep. 254); or "heirs," *Durbin v. Redman*, 140 Ind. 694 (40 N. E. Rep. 133); *Francks v. Whitaker*, 116 N. C. 518 (21 S. E. Rep. 175). As to the use of the word issue, *Gammell v. Ernst*, R. I. (38 Atl. Rep. 222). As to remainders, *Spear v. Fogg*, 87 Me. 132 (32 Atl. Rep. 791); *In re Baer*, 147 N. Y. 348 (41 N. E. Rep. 702); *In re Gillam's Estate*, 61 Minn. 459 (63 N. W. Rep. 1028); *Crews' Adm'r v. Hutcher*, 91 Va. 378 (21 S. E. Rep. 811); *McChord v. Caldwell's Ex'r*, 96 Ky. 617 (29 S. W. Rep. 440). As to trusts, *Mackrell v. Walker*, 172 Pa. 154 (33 Atl. Rep. 337); *Stodder v. Hoffman*, 158 Ill. 486 (41 N. E. Rep. 1082).

Sec. 885. Description of the property—Mistakes. Where the description of the property devised is manifestly incorrect, so much as is false in the description of the premises devised may be stricken out; and after striking out the false description, if enough remains to identify the premises intended to be devised, the will may be read and construed with the false words eliminated therefrom. *Whitcomb v. Rodman*, 156 Ill. 116 (40 N. E. Rep. 553; 47 Am. St. Rep. 181; 28 L. R. A. 149).

Sec. 886. Recitals in wills—Presumptions. If the erroneous recital in a testamentary instrument be a gift contained in the instrument, the recital may operate as being in itself a devise or bequest by implication of that very property. But where the erroneous recital refers to an estate created by another instrument, that recital cannot operate to create an estate by implication. *Zimmerman v. Hafer*, 81 Md. 347 (32 Atl. Rep. 316). The law will presume in favor of a devise or legacy that it is not annulled by a clause of revocation in a codicil if a mistake as to fact moves the testator to write it and continue it in force, and he states in the writing what the fact is, and therein shows that the revocation is made condi-

tional upon its existence. *Giddings v. Giddings*, 65 Conn. 149 (82 Atl. Rep. 884; 48 Am. St. Rep. 192).

Sec. 887. Restraints on alienation — Perpetuities. Under the Mich. How. Ann. St., § 5581, it is held that where a testator gave a life estate in separate tracts of land to each of his three children with remainder over in each case to the body heirs of all such children, share and share alike, that since such body heirs cannot be ascertained until the death of all three children, the devises were void as suspending the power of alienation during the three lives in being. *Trufant v. Nunneley*, Mich. (64 N. W. Rep. 469). See, *Sawyer v. Cubby*, 146 N. Y. 192 (40 N. E. Rep. 869); *Hughes v. Hughes*, 91 Wis. 188 (64 N. W. Rep. 851). As to perpetuities, see *Hillen v. Iselin*, 144 N. Y. 865 (39 N. E. Rep. 868); *Montignani v. Blade*, 145 N. Y. 111 (39 N. E. Rep. 719); *Davenport v. Kirkland*, 156 Ill. 169 (40 N. E. Rep. 804). See Estates.

Sec. 888. Determination of devisees. It is a general rule that the heirs of a testator are to be taken from the time of his death, yet this rule gives way to a contrary intent to be found in the will. It is held that where land is to be devised to the daughters of the testator and "on both their decease" without issue to his heirs, the heirs take by way of an executory devise and are to be determined as of the date of the death of the surviving daughter and not as of the date of the testator's death. And a subsequent clause designating the heirs by the words "according to the statute of descents," refers to the statutes in force at the time of the executor's death. *De Wolf v. Middleton*, 18 R. I. 810 (81 Atl. Rep. 271; 31 L. R. A. 146). The rights of devisees and legatees as well as their power to take are to be determined as of the date when the will becomes operative, that is, at the death of the testator. *Coggeshall v. Home for Friendless Children*, 18 R. I. 696 (81 Atl. Rep. 694). As to when children of a deceased grandchild will take under a devisee to the grandchild, see *Edgerly v. Barker*, 66 N. H. 534 (81 Atl. Rep. 900). As to designation of a charitable use, see *Tichenor v. Brewer's Ex'r*, Ky. (33 S. W. Rep. 86).

Sec. 889. Powers—Construction of wills in reference to. Where a will devises real estate to a widow for life or widowhood the income therefrom to be applied to the support of herself and minor children, a power of sale given in such will does not authorize her to convey the land upon a nominal consideration or by way of gift. *Sires v. Sires*, 48 S. C. 266 (21 S. E. Rep. 115). For construction of wills, in reference to powers, which depend upon particular facts, see *Poole v. Anderson*, 80 Md. 454 (31 Atl. Rep. 207). *In re Ingersoll's Estate* (App. to Thomas), 167 Pa. 536 (31 Atl. Rep. 858); *Hillen v. Iselin*, 144 N. Y. 365 (89 N. E. Rep. 368); *Lovejoy v. McDonald*, 59 Minn. 398 (61 N. W. Rep. 320); *Morffew v. San Francisco & S. R. R. Co.*, 107 Cal. 587 (40 Pac. Rep. 810); *Hatchett v. Hatchett*, 103 Ala. 556 (16 So. Rep. 550); *Morgan v. Halsey*, Ky. (31 S. W. Rep. 866).

Sec. 890. Execution of a testamentary power. In order that the will of the donee of a power may demonstrate an intention to execute the same, there should be either some reference in the will to the power, or some reference to the property which is the subject on which the power is to be executed, or it must appear that otherwise the instrument will be ineffectual. *Mason v. Wheeler*, R. I. (31 Atl. Rep. 426). A general residuary devise will operate as an execution of a power to dispose of property by will unless there is something to show that such was not the testator's intention. *Johnston v. Knight*, 117 N. C. 122 (23 S. E. Rep. 92).

Sec. 891. Per capita or per stirpes. Where the residuary devise directs the balance of an estate to be "equally divided" among certain devisees, the distribution should be *per capita* unless the text of the will affirmatively shows a different intention. *Johnson v. Knight*, 117 N. C. 122 (23 S. E. Rep. 92). See, *Butler v. Butler*, Ky. (30 S. W. Rep. 4). See Descent.

Sec. 892. As to what is after acquired property. In Rhode Island it is held that after-acquired real estate is not affected by a will in which there is no express reference to such estate although the description contained in the will is

general and although it might be inferred from the whole will that it was the intention of the testator to dispose of all his property. Property on which the testator had a mortgage prior to the date of his will and to which he subsequently acquired absolute title under a power of sale is after-acquired property; but land sold under a mortgage and conveyed before the date of the will to a trustee who was under obligations to transfer it to the testator at any time and who conveyed it after the date of the will is not after-acquired real estate. *Webster v. Wiggin*, R. I. (81 Atl. Rep. 824; 28 L. R. A. 510).

Sec. 893. Revocation of wills. Under Cal. Civ. Code, § 1298, providing that if a testator marry, and have "issue of such marriage," his former will is revoked, it is held that the adoption of a child does not work a revocation. *In re Comassi's Estate*, 107 Cal. 1 (40 Pac. Rep. 15; 28 L. R. A. 414). Under a statute (Cal. Civ. Code, § 1300), providing that "a will executed by an unmarried woman is revoked by her subsequent marriage, and is not revived by the death of her husband," it is held that a will executed by a married woman will not be revoked by the death of her then husband and her subsequent marriage. *In re Comassi's Estate*, 107 Cal. 1 (40 Pac. Rep. 15; 28 L. R. A. 414). Where a codicil to a will containing a residuary clause revokes, but does not dispose of, a specific devise of land in the will, and confirms the original will, the land becomes a part of the residuary estate. *Giddings v. Giddings*, 65 Conn. 149 (32 Atl. Rep. 834; 48 Am. St. Rep. 192). For a case depending on particular facts, see, *Belshaw v. Chitwood*, 141 Ind. 877 (40 N. E. Rep. 908).

Sec. 894. Lapsed devises—As to who is a relative. Under Washington Gen. St., § 1467, which provides for the descendants of the devisee taking the estate in case the devisee dies before the testator where there has been a devise to a "child, grandchild, or other relative of the testator," it is held that such devise to a wife lapses upon her death on the ground that she is not a relative of the husband and testator. *In re Renton's Estate*, 10 Wash. St. 588 (39 Pac. Rep. 145).

Sec. 895. Charge of legacies upon lands devised.

Where it is manifested that it was the design of a testator that legacies should be paid at all events, the implication is that the residuary devisee or legatee shall have only the remainder after satisfaction of the previous dispositions. Where a will charges with a legacy land devised to a person, and he conveys it to a third person, who retains in his hand of the purchase money a sum to pay the legacy, and promises his grantor to pay it, such grantor may maintain a bill in equity against his grantee, making the legatees parties to compel the payment of such fund on the legacy, and to enforce the charge on the land. *Bird v. Stout*, 40 W. Va. 48 (20 S. E. Rep. 852). In a recent case the supreme court of Michigan say: "It is the settled rule that legacies are always payable, presumptively, out of the personal estate, and if a deficiency exists the legacies must abate, unless they are made chargeable upon the real estate. 2 Redf. Wills, 209; 18 Am. & Eng. Enc. Law, 110, 126; *Canfield v. Bostwick*, 21 Conn. 550. Another equally well settled rule is that the real estate of the testator must be made chargeable with the payment of legacies, either expressly or by clear implication. *Massaker v. Massaker*, 18 N. J. Eq. 264; *Olden v. White*, 5 N. J. Eq. 629; *Taylor v. Tolen*, 88 N. J. Eq. 91. Also, if legacies are given generally, and the residue of the real and personal estate is afterward given in one mass, the legacies are a charge on the residuary real, as well as the personal, estate. Hawk. Wills, 294; *Thayer v. Finnegan*, 184 Mass. 64 (45 Am. Rep. 285)—where the principle will be found discussed, and many authorities cited—*White v. Olden*, 4 N. J. Eq. 848; *Hoyt v. Hoyt*, 85 N. Y. 149. It follows that it is the duty of courts to first examine with care the will itself, for, if the intention of the testator can be gathered from the four corners of the instrument, that intention must prevail, and be given effect." *Hibler v. Hibler*, 104 Mich. 274 (62 N. W. Rep. 861). Where a devise of land provides that suitable support shall be given to certain persons until the happening of specified events it does not constitute a rent charged upon the land but is an equitable lien which appertains to the beneficiaries personally and to them alone. *Dodge v. Hogan*, R. I. (31 Atl. Rep. 268). Forfeiture of devises for failure to pay legacies charged thereon are not favored. *Cun-*

ningham v. Parker, 146 N. Y. 29 (40 N. E. Rep. 635). For cases depending upon particular facts, see, *In re Denis' Estate*, 169 Pa. 498 (32 Atl. Rep. 436); *Chase v. Warner*, Mich. (64 N. W. Rep. 780); *Hunt v. Wheeler*, 116 N. C. 422 (21 S. E. Rep. 915); *McQueen v. Lilly*, 131 Mo. 9 (31 S. W. Rep. 1048).

Sec. 896. Dower—Devises and bequests in lieu of. In Iowa, unless the will contains contrary provisions a widow may take a life estate under it, and also her distributive share or dower, under the law, in the same real estate, and where a widow occupied lands during her life in which she held such interests without having her distributive share set apart her heirs are not thereby estopped from asserting such interests therein, on the ground that by such occupation she elected to take under the will. *Hunter v. Hunter*, Ia. (64 N. W. Rep. 656). The Montana statute, Acts 1876, p. 64, § 6, is as follows: "Every devise of land or any estate therein, by will, shall bar her dower in lands, or of her share in personal estate, unless otherwise expressed in the will; but she may elect whether she will take such devise or bequest; or whether she will renounce the benefit of such devise or bequest, and take her dower in the lands and her share in the personal estate." Under this statute it is held that where a widow takes under the will of her husband, unless it is otherwise expressly provided in the will, she has no right to dower in lands conveyed by her husband alone during their marriage. *Spalding v. Hershfield*, 15 Mont. 253 (39 Pac. Rep. 88). Where no estate in the land is devised to a testator's widow, a mere provision that the devisees are to support her out of the income arising from the land, in the absence of an express declaration to that effect, is not a devise in lieu of dower. *Rivers v. Gooding*, 43 S. C. 428 (21 S. E. Rep. 310). A devise of land in trust conditioned upon the devisee giving bond to support the testator's widow during life, followed by the filing of such bond by him, and his performance of the obligation, is such a provision under Wis. Rev. Stat, 1858, Ch. 89, § 18, as deprives the widow of dower unless she elects to the contrary within the time specified by the statute. *Turner v. Oberheu*, 89 Wis. 1 (61 N. W. Rep. 280). As to when a

devise will be held to be in lieu of dower, as illustrated by cases depending upon particular facts, see, *Nelson v. Brown*, 144 N. Y. 384 (89 N. E. Rep. 355).

Sec. 897. Widow's election—Estoppel to make. In a recent case it is said: "Before the widow can be denied her right to elect upon distribution it must be found that, with the knowledge of her rights, by unequivocal acts evincing her intent, she has so dealt with the property left her by the will that it would be inequitable to permit her to avoid these acts and disclaim her intent. Professor Pomeroy, in language adopted by this court in *Borroughs v. De Couts*, 70 Cal. 371 (11 Pac. Rep. 784), thus enunciates the principle: 'To raise an inference of election from the party's conduct merely, it must appear that he knew of his right to elect, and not merely of the instrument giving such right, and that he had full knowledge of all the facts concerning the properties. As an election is necessarily a definite choice by the party to take one of the properties and to reject the other, his conduct, in order that an election may be inferred, must evince an intention to elect, and must show such an intention. The intention, however, may be inferred from a series of unequivocal acts. * * *

Where a widow is required to elect between a testamentary provision in her favor and her dower, any unequivocal act of dealing with the property given by the will as her own, or the exercise of any unmistakable act of ownership over it, when done with knowledge of her right to elect, and not through a clear mistake as to the condition and value of the property, will be deemed an election by her to take under the will and to reject her dower.' Pom. Eq. Jur., § 515; Bigelow, Estop. p. 568." *In re Smith's Estate*, 108 Cal. 115 (40 Pac. Rep. 1037). Where a testator devises to his widow all the lands he owns between certain lines, "including my homestead," she is put to her election to accept the devise or claim her community interest. *Chace v. Gregg*, 88 Tex. 552 (32 S. W. Rep. 520). See, *Stokes v. Norwood*, 44 S. C. 424 (22 S. E. Rep. 417).

INDEX TO STATUTES.

Note. Instead of merely indexing the statutory cases with catch words as to the subjects considered, as in volume one, we have carefully epitomized these and placed them in their logical positions in the book. This index refers to the sections and pages in this volume wherein statutes are cited, construed, referred to, or quoted. To prevent confusion we have used the abbreviation Sec. when referring to a section of statute, and made all references to our work to the sections (using the section mark §) and also the page.

ENGLAND.

Statute of 3 & 4, W. & M. ch. 14, § 181, p. 174; § 541, p. 544; 1 Vict. ch. 26, § 61, p. 73; 9 Geo. II, ch. 36, § 60, p. 71; 53 Geo. III, ch. 127, § 667, p. 645.

UNITED STATES.

Constitution. Art. 1, Sec. 10, § 723, p. 692; Art. 4, Sec. 1, § 290, p. 305; § 665, p. 640; § 839, p. 809. **Revised Statutes.** Sec. 1041, § 447, p. 468; Sec. 1925, § 798, p. 760; Sec. 2269, § 649, p. 622; Sec. 2288, § 647, p. 620; Sec. 2296, § 648, pp. 620, 621; Sec. 2306, § 646, p. 619; Sec. 2322, § 642, p. 615; Secs. 2323, 2324, § 641, p. 614; Sec. 2324, § 641, p. 615; Sec. 2325, § 642, p. 615, Secs. 2325, 2326, § 642, p. 616; Sec. 2329, § 642, p. 615; Secs. 2332, 2333, § 642, p. 615; Sec. 2336, § 642, p. 616; Secs. 2339, 2340, § 636, p. 610; Sec. 2384, § 641, p. 615; Secs. 2387, 2388, § 644, p. 618; Secs. 2395, 2396, § 586, p. 590; Sec. 2461, § 173, p. 169; Sec. 5057, § 789, p. 748; Sec. 5438, § 654, p. 626. **Statutes at Large.** Vol. 14, p. 218, § 639, p. 612; Vol. 20, p. 113, § 646, p. 620; Vol. 25, p. 357, § 445, p. 466; Vol. 26, p. 1026, § 644, p. 618. **Acts of Congress.** 1790, Act, May 26, § 670, p. 649; 1803, Act, Mar. 3, § 637, p. 611; 1850, Act, Sept. 9, § 637, p. 610; 1850, Act, Sept. 28, § 639, p. 612; 1857, Act, Mar. 3, § 645, p. 619; 1862, Act, July 1, § 645, p. 619; 1866, Act, July 23, § 639, p. 612; § 645, p. 619; 1866, Act, July 26, § 398, p. 418; 1871, Act, Feb. 18, § 654, p. 627; 1874, Act, Mar. 23, § 646, p. 619; 1874, Act, June 1, § 646, p. 620; 1880, Act, May 14, § 646, p. 620; 1880, Act, May 27, § 654, p. 627; 1882, Act, Aug. 7, § 654, p. 627; 1885, Act, Feb. 25, § 637, p. 611, § 654, p. 627; 1886, Act, July 10, § 798, p. 758; 1888, Act, Feb. 18, § 645, p. 619; 1889, Act, Feb. 13, § 645, p. 619; 1890, Act, May 14, § 644, pp. 617, 618; 1891, Act, Mar. 3, § 644, p. 618; § 654, p. 626.

ALABAMA.

Constitution. Art. 10, Sec. 6, § 466, p. 481. **Code (1876).** Sec. 2785, § 409, p. 428. **Code (1886).** Sec. 592, § 19, p. 35; § 816, p. 779; Sec. 1798, § 294, p. 310; Sec. 1801, § 591, p. 594; Sec. 1802, § 19, p. 35; § 816, p. 779; Sec. 1842, § 256, p. 268; Sec. 1867, § 591, p. 594; Secs. 1868, 1869, § 540, p. 543; Sec. 1894, § 110, p. 115; Sec. 1899, § 463, p. 480; Sec. 211, § 308, p. 322; Sec. 2121, subd. 5, § 775, p. 736; Sec. 2349, § 462, p. 479; § 466, p. 481; Sec. 2353, § 178, p. 172; Sec. 2507, § 350, p. 378; Sec. 2514, § 295, p. 310; Secs. 2526, 2534, § 360, p. 385; Sec. 2543, § 350, p. 378; Sec. 2550, § 347, p. 370; § 350, p. 378; Sec. 2554, § 350, p. 378; Sec. 2614, § 311, p. 325; Sec. 2698, § 210, p. 204; Sec. 2728, § 543, p. 547; Sec. 2907, § 298, p. 312; Sec. 3018, § 515, p. 513; Sec. 3019, § 499, p. 495; Sec. 3022, § 509, p. 506; § 511, p. 509; Sec. 3047, § 516, p. 516; Sec. 3059, § 425, p. 442; Sec. 3069, § 425, p. 443; Sec. 3075, § 425, p. 443; Secs. 3359, 3362, § 296, p. 311. **Laws.** 1880-81, p. 267, § 466, p. 481; 1890-91, p. 578, § 517, p. 517; 1892-93, p. 1127, § 543, p. 547.

ARIZONA.

Revised Statutes. Par. 2694, § 808, p. 772.

ARKANSAS.

Constitution. Art. 9, Sec. 6, § 355, p. 378. **Mansfield's Digest.** Sec. 474, § 868, p. 833; Secs. 661, 663, § 592, p. 594; Sec. 2599, § 178, p. 172; Sec. 2691, § 178, p. 172; Secs. 3058, 3059, § 406, p. 425; Sec. 4475, § 820, p. 783. **Sandel and Hill's Digest.** Sec. 702, § 178, p. 172; Sec. 706, § 110, p. 114; § 178, p. 172; Sec. 719, § 592, p. 594; Sec. 2488, § 178, p. 172; § 182, p. 175; Sec. 2537, § 179, p. 173; Sec. 4819, § 39, p. 53; § 820, p. 783; Sec. 5090, § 727, p. 695; Sec. 6612, § 812, p. 774; Sec. 6625, § 813, p. 775. **Laws.** 1879, Act, Mar. 17, § 557, p. 561; 1887, Act, Mar. 18, § 358, p. 382; 1893, Act, April 13, § 155, p. 158; 1895, Acts, p. 58, § 467, p. 482; 1895, p. 37, § 156, p. 159; 1895, p. 58, § 592, p. 594.

CALIFORNIA.

Constitution. Art. 6, Sec. 5, § 673, p. 651; Art. 13, Sec. 2, § 801, p. 765; Art. 17, Sec. 3, § 639, p. 612. **Civil Code.** Secs. 146, 147, § 68, p. 81; Sec. 164, § 68, p. 80; Sec. 502, § 750, p. 713; Sec. 704, § 131, p. 139; Sec. 715, § 261, p. 272; Sec. 771, § 261, p. 273; Sec. 1007, § 37, p. 52; Sec. 1019, § 315, p. 329; Sec. 1045, § 131, p. 139; Secs. 1094, 1095, § 593, p. 595; Sec. 1107, § 538, p. 540; Sec. 1181, § 18, p. 34; § 157, p. 159; Sec. 1192, § 593, p. 595; Secs. 1213, 1214, § 714, p. 686; Sec. 1216, § 593, p. 595; Sec. 1241, § 358, p. 382; Secs. 1260-1263, § 348, p. 370; Sec. 1298, § 893, p. 848; Sec. 1300, § 893, p. 848; Sec. 1411, § 403, p. 422; Sec. 1412, § 403, p. 423; § 636, p. 610; Sec. 1422, § 403, p. 423; Sec. 1942, § 320, p. 335; Sec. 2512, § 521, p. 521; Sec. 2854, § 536, p. 537; Sec. 2927, § 526, p. 524; Sec. 2933, § 593, p. 595; Sec. 2941, § 540, p. 543; Sec. 3449, § 41, p. 56; Sec. 3457, § 46, p. 58; Sec. 3493, § 569, p. 573. **Code Civil Procedure.** Sec. 258, §

549, p. 552; Sec. 259, § 18, p. 34; Sec. 259, § 157, p. 159; Sec. 325, § 30, p. 45; Sec. 448, § 286, p. 303; Sec. 701, § 724, p. 693; Sec. 726, § 543, p. 547; Sec. 738, §§ 655-657, pp. 628, 629; Sec. 752, § 581, p. 586; Secs. 1159, 1160, 1172, § 320, p. 335; Sec. 1183, § 504, p. 500; § 640, p. 613; Sec. 1184, § 502, p. 498; § 517, p. 517; Sec. 1185, § 493, p. 487; Sec. 1187, § 506, p. 502; § 507, p. 504; Sec. 1193, § 502, p. 498; Sec. 1195, § 515, p. 513; Sec. 1202, § 510, p. 508; Sec. 1475, § 543, p. 546; Sec. 1506, § 543, p. 546; Sec. 1537, § 308, p. 322; Sec. 1582, § 319, p. 334. **Political Code.** Sec. 3215, § 520, p. 520; Secs. 3446, 3456, § 639, p. 613; Sec. 3519, § 653, p. 625; Sec. 3549, § 638, p. 611; Secs. 3668-3670, § 818, p. 783; Sec. 3785, § 815, p. 778; § 816, p. 780; Secs. 3786, 3787 § 817, p. 781. **Supplement to Codes (1895).** Sec. 1094, § 593, p. 595. **Laws.** 1858, p. 198, § 639, p. 612; 1861, p. 140, § 653 p. 625; 1883, Act, Mar. 13, § 817, p. 781; 1885, Act, Mar. 12, § 644, p. 618; 1887, Act, Mar. 7, § 403, p. 422; § 798, p. 758; 1887, p. 32, § 403, p. 423; 1889, pp. 212, 213, § 403, p. 423; 1889, Act, Mar. 18, § 68, p. 80; 1891, pp. 143, 147, § 403, p. 423.

COLORADO.

General Statutes (1883). Pp. 662-669, § 497, p. 492; Sec. 1063, § 763, p. 725; Sec. 1716, § 403, p. 423; Secs. 2147, 2180, § 781, p. 740; Sec. 2934, § 809, p. 772. **Mills' Annotated Statutes.** Secs. 438, 445, § 594, p. 596; Sec. 2867, § 494, p. 489; Sec. 3904, § 820, p. 785. **Code (1887).** Sec. 388, § 688, p. 664. **Laws.** 1889, p. 247, § 502, p. 498; 1889, p. 249, Sec. 3, § 508, p. 505; 1891, p. 118, § 515, p. 514.

CONNECTICUT.

General Statutes. Secs. 2954, 2956, 2961, § 595, p. 596; Sec. 2969, § 422, p. 440. **Laws.** 1895, p. 473, § 158, p. 159; 1895, p. 706, Sec. 12, § 468, p. 482.

DELAWARE.

Revised Code. Ch. 3, p. 680, Sec. 28, § 555, p. 559; Ch. 95, Sec. 13, § 386, p. 409; Ch. 120, Sec. 60, § 425, p. 443. **Laws.** Ch. 83, Secs. 11-14, § 596, p. 596.

FLORIDA.

Constitution. 1885, Art. 11, Sec. 2, § 469, p. 482. **McClellan's Digest.** Sec. 21, p. 596, § 798, p. 758. **Revised Statutes.** Sec. 1792, § 597, p. 596; Secs. 1967, 1970, § 597, p. 596. **Laws.** 1855-56, Ch. 610, § 798, p. 758; 1872, Ch. 1869, Sec. 16, § 112, p. 116; 1887, Ch. 3681, Sec. 47, § 821, p. 785; 1887, Ch. 3681, Sec. 57, § 816, p. 779; 1887, Ch. 3747, § 517, p. 517; § 506, p. 502; 1889, Ch. 3891, §§ 41, 42, p. 56; 1891, Ch. 4011, § 816, p. 781.

GEORGIA.

Code. Sec. 1754, § 425, p. 443; Sec. 1768, § 179, p. 173; Sec. 1966, § 537, p. 539; Sec. 1969, § 110, p. 115; § 394, p. 414; Secs. 2000, 2028, § 351, p. 373; Sec. 2040, § 348, p. 371; Sec. 2182, § 598, p. 597; Sec. 2244, § 537,

p. 539; Sec. 2285, § 427, p. 447; Sec. 2289, § 425, p. 443; Sec. 2448, § 311, p. 324; Sec. 2564, § 311, p. 324; Sec. 2664, § 31, p. 46; Sec. 2697, § 142, p. 148; Sec. 3187, § 210, p. 205; Secs. 3586, 3654, § 863, p. 829; Sec. 4077, § 429, p. 448; § 830, p. 794; Sec. 4082, § 427, p. 447. **Laws.** 1874, p. 105, § 821, p. 786; 1875, p. 119, § 821, p. 786; 1889, p. 106, § 442, p. 465; § 448, p. 468; § 532, p. 532; 1895, p. 73, § 159, p. 159.

IDAHO.

Revised Statutes. Sec. 1554, § 814, p. 777; Secs. 2924, 2925, § 599, p. 597; Sec. 3003, § 599, p. 597; Sec. 3104, § 641, p. 614; Sec. 3357, § 599, p. 597; Sec. 5130, § 507, p. 504.

ILLINOIS.

Starr and Curtis's Annotated Statutes. Ch. 116, par. 29, Sec. 24, § 3, p. 18; Vol. 2, p. 1937, § 749, p. 712; p. 2042, § 801, p. 766. **Revised Statutes (1845).** Ch. 25, div. 1, Secs. 17-21, § 600, p. 597. **Revised Statutes (1893).** Ch. 2, Sec. 1, § 825, p. 790; Ch. 10a, Sec. 8, § 46, p. 58; Ch. 10a, Sec. 15, § 44, p. 57; Ch. 32, Sec. 88, § 798, p. 758; Ch. 39, Sec. 10, § 884, p. 844; Ch. 43, Sec. 10, § 441, p. 463; Ch. 45, Sec. 25, § 213, p. 207; Ch. 51, Sec. 13, § 290, p. 305; Ch. 57, Sec. 2 Cl. 4, § 320, p. 335; Ch. 82, 23, § 515, p. 514; Ch. 82, Sec. 28, § 499, p. 493; Ch. 83, Sec. 11, § 781, p. 740; Ch. 109, § 122, p. 127; Ch. 116, Sec. 13, § 291, p. 306; Ch. 120, Sec. 2, Cl. 2, § 800, p. 763; Ch. 120, Sec. 41, § 801, p. 766; Ch. 120, Sec. 182, § 806, p. 770; Ch. 120, Sec. 191, § 801, p. 766; Ch. 120, Sec. 216, § 815, p. 778; Ch. 120, Sec. 224, § 812, p. 775; Ch. 120, Sec. 276, § 802, p. 767; Ch. 132, Sec. 1, § 536, p. 538. **Revised Statutes (1895).** Ch. 95, Sec. 14, § 559, p. 565. **Laws.** 1869, Act, Mar. 27, § 471, p. 482; 1869, p. 359, Sec. 1, § 600, p. 597; 1874, Act, Mar. 31, § 312, p. 326; 1887, Act, June 15, § 337, p. 356; 1895, p. 129, § 160, p. 160.

INDIANA.

Revised Statutes (1881). Sec. 1186, § 260, p. 271; Secs. 5116, 5117, § 518, p. 518; Secs. 6446, 6447, § 803, p. 768; § 818, p. 782; Sec. 6492, § 818, p. 782. **Revised Statutes (1894).** Sec. 294, subd. 4, § 781, p. 740; Secs. 744, 746, § 297, p. 312; Sec. 1200, § 260, pp. 270, 271; §§ 575, 576, pp. 580, 581; Sec. 2174, § 423, p. 441; Sec. 2627, § 174, p. 170; Sec. 2641, § 182, p. 176; Sec. 2656, § 178, p. 172; Sec. 2669, § 301, p. 314; § 371, p. 398; Secs. 3337, 3338, § 601, p. 598; Sec. 3341, § 369, p. 397; Secs. 3364, 3365, § 382, p. 407; Sec. 3403, § 109, p. 114; § 371, p. 397; Sec. 4290, § 460, p. 477; Sec. 4357, § 568, p. 573; Sec. 5324, § 312, p. 326; Secs. 6564, 6565, § 313, p. 327; Sec. 7096, § 100, p. 104; Sec. 7257, § 517, p. 516; Sec. 8610, § 814, p. 777. **Elliott's Supplement.** Sec. 2147, § 803, p. 768; § 818, p. 782.

IOWA.

Constitution. Art. 1, Sec. 22, § 40, p. 54. **Revised Statutes (1860).** Secs. 2488-2493, § 40, p. 55. **Code.** Sec. 469, § 10, p.

28; Sec. 737, § 800, p. 762; Sec. 845, § 801, p. 766; Sec. 876, § 814, p. 777; Sec. 897, § 812, p. 775; Sec. 902, § 820, p. 785; Sec. 925, § 248, p. 257; Sec. 946, § 12, p. 29; Sec. 1271, § 798, p. 758; Sec. 1558, § 349, p. 371; Sec. 1894, § 815, p. 778; Sec. 1931, § 275, p. 289; Secs. 1941, 1962, 1969, § 602, p. 598; Sec. 1990, § 358, p. 382; Secs. 2000, 2001, § 350, p. 373; Sec. 2017, § 425, p. 442; Sec. 2133, § 510, p. 508; Sec. 2453, § 884, p. 844; Sec. 2529, § 781, pp. 740, 741; Sec. 2903, § 684, p. 662; Sec. 3198, § 690, p. 666; Sec. 3275, § 662, p. 633. **Laws.** 1888, Ch. 30, § 312, p. 326; 16th Gen. Assem., Ch. 100, Sec. 8, § 502, p. 499; 20th Gen. Assem., Ch. 203, § 23, p. 36; 22d Gen. Assem., Ch. 85, Sec. 1, § 40, p. 54.

KANSAS.

Code. Sec. 17, § 820, p. 785; Sec. 40, § 248, p. 257; Sec. 425, § 248, p. 257; Sec. 435, § 248, p. 257; Sec. 594, § 660, p. 632. **General Statutes (1868).** Ch. 114, Secs. 6-8, § 730, p. 697. **General Statutes (1889).** Ch. 46, Sec. 7, § 522, p. 522; Ch. 107, § 820, p. 785; Secs. 1131-1133, § 603, p. 598; Sec. 1321, § 760, p. 721; Pars. 1321, 1322, § 762, p. 724; Par. 2599, § 371, p. 398; Pars. 6987, 6988, § 814, p. 777. **Laws.** 1872, Ch. 141, § 507, p. 503; 1879, Ch. 43, § 814, p. 777; 1889, Ch. 168, Sec. 13, § 517, p. 516; 1889, Ch. 175, § 540, p. 543; 1893, Ch. 109, § 723, p. 692.

KENTUCKY.

Civil Code. Sec. 58, subd. 2, § 565, p. 571; Sec. 62, § 673, p. 651; Sec. 96, subd. 3, § 661, p. 633; Sec. 391, § 309, p. 323; Sec. 490, § 578, p. 583; Sec. 491, § 410, p. 429; Sec. 694, subd. 3, § 545, p. 548. **General Statutes.** Ch. 24, Secs. 13, 36, § 604, p. 599; Ch. 38, Art. 13, Sec. 16, § 352, p. 375; Ch. 63, Art. 1, Sec. 21, § 841, p. 811; Ch. 81, Sec. 17, § 20, p. 35; Ch. 92, Art. 9, Sec. 15, § 805, p. 770. **Laws.** 1882, Act, Apr. 24, § 798, p. 758; 1884, Act, May 5, § 798, p. 758.

LOUISIANA.

Constitution. Art. 210, § 808, p. 771; § 821, p. 786. **Revised Statutes.** Sec. 2359, § 409, p. 429. **Civil Code.** Art. 222, § 409, p. 429; Arts. 829, 830, § 653, p. 625; Art. 1330, § 580, p. 585; Arts. 1502, 1749, 1750, § 374, p. 400; Art. 2286, § 580, p. 585; Arts. 3186, 3274, § 711, p. 684; Arts. 2687, 2699, § 422, p. 440; Arts. 2992, 2996, 2997, § 605, p. 599. **Laws.** 1878, Act, No. 25, § 409, p. 429; 1873, No. 47, § 807, p. 771; 1888, No. 80, § 819, p. 783; 1884, Act, No. 82, § 801, p. 763; § 821, p. 786; 1888, No. 85, § 821, p. 786; 1888, No. 106, § 653, p. 625; 1880, No. 107, § 821, p. 786.

MAINE.

Revised Statutes. Ch. 51, Sec. 36, § 312, p. 327; Ch. 51, Sec. 64, § 761, p. 722; Ch. 51, Sec. 141, § 494, p. 490. Ch. 91, Sec. 30, § 496, p. 492; Ch. 105, Sec. 10, § 27, p. 43. **Laws.** 1895, p. 37, § 712, p. 685.

MARYLAND.

Code. Art. 16, Sec. 43, § 114, p. 118; Art. 16, Sec. 116, § 578, p. 583; Art. 23, Sec. 169, § 17, p. 33; Art. 47, Sec. 23, § 46, p. 58; Art. 56, Sec. 36, § 476, p. 483; Art. 66, Sec. 11, § 527, p. 526. **Public Laws.** Art. 10, Secs. 25, 28, § 606, p. 599; Art. 21, Secs. 25-27, § 606, p. 599. **Laws.** 1894, Ch. 162, § 219, p. 212; 1872, Ch. 270, § 476, p. 483.

MASSACHUSETTS.

Revised Statutes. Ch. 73, Sec. 39, § 297, p. 312. **Public Statutes.** Ch. 12, Sec. 38, § 816, p. 781; Ch. 27, Sec. 114, § 298, p. 312; Ch. 80, Sec. 28, § 569, p. 574; Ch. 100, Sec. 15, § 850, p. 819; Ch. 112, Sec. 39, § 225, p. 219; Ch. 120, Sec. 1, § 607, p. 600; Ch. 120, Sec. 4, § 710, p. 682; Ch. 120, Sec. 14, § 607, p. 600; Ch. 126, Sec. 5, § 822, p. 787; Ch. 127, Sec. 21, § 884, p. 844; Ch. 172, Sec. 29, § 298, p. 312; Ch. 172, Sec. 46, § 297, p. 312; Ch. 175, Sec. 1, § 320, p. 335; Ch. 178, Sec. 3, § 576, p. 582; Ch. 191, Sec. 1, § 495, p. 491; § 502, p. 499; § 515, p. 513; Ch. 191, Secs. 1, 2, § 517, p. 517; Ch. 191, Sec. 6, § 509, p. 507; § 510, p. 509; Ch. 191, Sec. 11, § 515, p. 513. **Statutes.** 1849, Ch. 205, § 607, p. 600; 1887, Ch. 348, § 313, p. 328; 1888, Ch. 390, Sec. 57, § 814, p. 777; 1888, Ch. 393, § 718, p. 690; 1889, Ch. 214, p. 129, § 170, p. 167; 1890, Ch. 428, § 224, p. 218; 1892, Ch. 191, § 509, p. 507; 1892, Ch. 433, § 224, p. 218; 1893, Ch. 126, § 224, p. 218; 1893, Ch. 396, § 515, p. 513.

MICHIGAN.

Constitution. Art. 18, Sec. 2, § 248, p. 258. **Howell's Statutes.** Sec. 2, Par. 3, § 248, p. 259; Sec. 1170f4, § 818, p. 783; Vol. 3, Sec. 1170g6, § 817, p. 781; Sec. 1170i4, § 818, p. 783; Vol. 1, Sec. 3142, § 556, p. 560; Vol. 3, Sec. 3208b, § 556, p. 560; Sec. 3466, § 248, p. 257; Sec. 3468, § 248, p. 257; Sec. 5531, § 887, p. 846; Sec. 5575, § 841, p. 812; Secs. 5690-5692, § 608, p. 600; Sec. 5732, § 161, p. 161; Sec. 5772a, § 174, p. 170; Vol. 2, Sec. 5875, § 415, p. 433; Sec. 5990, § 182, p. 176; Sec. 6042, § 310, p. 324; Sec. 6179, § 842, p. 813; Secs. 6181, 6183, § 779, p. 738; Vol. 3, Sec. 8295, § 320, p. 335; Vol. 3, Sec. 8295, subd. 3, § 555, p. 560; Vol. 3, Sec. 8296, § 320, p. 335; Sec. 8306, § 833, p. 796; Sec. 8498 subd. 4, § 533, p. 533; Sec. 8964, § 686, p. 663; Sec. 8964, subd. 2, § 832, p. 795; Secs. 8967-8969, § 686, p. 663. **Laws.** 1871, p. 320, Act. No. 191, § 608, p. 600; 1881, No. 183, § 764, p. 725; 1885, Sec. 104, § 821, p. 786; 1889, No. 195, Sec. 66, § 807, p. 771; § 812, p. 775; 1889, No. 195, Sec. 71, § 821, p. 786; 1891, No. 179, § 505, p. 502; 1892, No. 199, Sec. 9, § 515, p. 515; 1893, No. 198, Sec. 6, § 505, p. 502; 1895, pp. 346-348, § 161, pp. 160, 161.

MINNESOTA.

Constitution. Art. 9, Sec. 3, § 798, p. 759. **Revised Statutes (1866).** Ch. 11, Sec. 155, § 810, p. 773. **General Statutes (1878).** Ch. 34, Sec. 54, § 312, p. 327; Ch. 34, Sec. 60, § 760, p. 721; Ch. 38,

Sec. 8, § 730, p. 697; Ch. 40, Sec. 21, § 712, p. 685; Ch. 43, Sec. 7, § 730, p. 697; Ch. 81, Sec. 6, subd. 2, § 556, p. 560; Ch. 81, Sec. 23, § 550, p. 554; Ch. 81, Secs. 44, 45, § 550, p. 554; Sec. 92, § 814, p. 777. **Statutes (1891).** Secs. 4159-4163, § 609, p. 601. **General Statutes (1894).** Secs. 831, 832, § 586, p. 590; Sec. 1512, § 798, p. 759; Secs. 1579, 1586, § 818, p. 783; Sec. 1604, § 814, p. 777; Sec. 1631, § 818, p. 783; Sec. 1654, § 815, p. 778; Sec. 1662, § 814, p. 777; Sec. 2207, § 586, p. 590; Sec. 2641, § 227, p. 222; § 230, p. 229; Secs. 2647, 2656, § 743, p. 708; Sec. 2692, § 312, p. 327; Sec. 2700, § 760, pp. 721, 722; Sec. 3967, § 730, p. 679; Secs. 4011, 4012, § 653, p. 625; Secs. 4185, 4186, 4188, § 609, p. 600; Sec. 4203, § 609, p. 601; Sec. 4280, § 730, p. 697; Sec. 4360, § 609, p. 600; Sec. 4470, § 352, p. 374; Secs. 4502, 4503, § 543, p. 547; Sec. 4612, § 409, p. 428; Sec. 4622, § 609, p. 601; Sec. 4717, § 609, p. 601; Sec. 4749, § 182, p. 176; Sec. 5447, § 304, p. 317; Sec. 5521, § 349, p. 372; Sec. 5534, § 368, p. 396; Sec. 5758, § 586, p. 590; Sec. 5845, § 687, p. 664; Sec. 5850, § 375, p. 401; Sec. 5861, § 526, p. 525; Sec. 6051, § 550, p. 554; Secs. 6074, 6075, § 550, p. 554; Sec. 6229, § 494, p. 489; Sec. 6236, § 511, p. 510; Sec. 6238, § 515, p. 514; Sec. 6118, § 320, p. 335; § 429, p. 448. **Laws.** 1874, Ch. 1, Sec. 112, § 801, p. 765; 1889, Ch. 185, § 814, p. 777; 1889, ch. 200, Sec. 5, § 517, p. 517; 1891, p. 123, § 609, p. 601; 1895, p. 223, § 609, p. 601; 1895, p. 496, § 477, p. 483; 1895, p. 498, § 609, p. 601; 1895, pp. 743-751, § 162, p. 162. **Special Laws.** 1858, Ch. 64, § 716, p. 690.

MISSISSIPPI.

Constitution. 159f, 160, § 675, p. 653; Secs. 269, 270, §§ 58, 59, 63, pp. 69, 70, 75. **Code (1871).** Secs. 1701, 1702, § 814, p. 778; Sec. 1709, § 820, p. 785. **Code (1880).** Sec. 527, § 807, p. 771; Sec. 539, § 820, p. 785; Secs. 597-698, § 821, p. 786; Sec. 1833, § 675, p. 653; Secs. 1859 1860, § 819, p. 783; Sec. 2047, § 308, p. 320; Sec. 2694, § 788, p. 747; **Code (1892).** Secs. 193, 194, 196-199, 201, § 610, p. 601; Sec. 1981, § 356, p. 380; Secs. 2293, 2294, § 368, p. 396; Sec. 2441, § 822, p. 787; Secs. 2457, 2458, § 712, p. 687; Sec. 2498, § 422, p. 440; Sec. 2755, § 871, p. 834; Sec. 3101, § 580, p. 585; Sec. 3561, § 312, pp. 325, 327; Sec. 3815, § 821, p. 786; Sec. 4148, § 39, p. 53; § 638, p. 612. **Laws.** 1875, p. 16, § 814, p. 777.

MISSOURI.

Constitution. Art. 2, Sec. 21, § 16, p. 33; Art. 12, Sec. 4, § 86, p. 94. **Revised Statutes (1825).** P. 328, Sec. 8, § 182, p. 176. **General Statutes (1865).** Ch. 63, Sec. 20, § 639, p. 613; Ch. 152, § 578, p. 583; Ch. 161, Sec. 8, § 578, p. 583; P. 270; Sec. 69, § 543, p. 547. **Wagner's Statutes.** Vol. 1, p. 269, Sec. 5, § 134, p. 142. **Revised Statutes (1879).** Sec. 671, § 134, p. 142; § 653, p. 625. **Revised Statutes (1889).** Sec. 543, subd. 3, § 457, p. 475; Secs. 2013, 2022-2024, § 565, p. 570; Sec. 2397, § 611, p. 602; Secs. 2425, 2426, § 611, p. 602; Sec. 4475, § 182, p. 176; Sec. 4943, § 297, p. 312; Sec. 5435, § 351, p. 374; Sec. 6159, § 515, p. 513; Sec. 6709, § 511, p. 509; Sec. 6864, § 370, p. 397; § 461, p. 479; § 479, p. 484; Sec. 6869, § 370, p. 397; Sec.

7606, § 804, p. 768; Sec. 7683, § 818, p. 783; Sec. 8836, § 252, p. 264; Sec. 8919, § 294, p. 309. **Laws.** 1872, p. 130, Sec. 224, § 816, p. 781; 1887, p. 37, § 248, p. 257; 1895, p. 222, § 479, p. 484.

MONTANA.

Constitution. Art. 3, Sec. 14, § 240, p. 245. **Civil Code.** Secs. 1503, 1504, § 612, p. 602; Secs. 1606, 1611, § 612, p. 602; Secs. 1641-1643, § 612, p. 602; Sec. 3822, § 612, p. 602. **Civil Code (1895).** Sec. 722, § 53, p. 65. **Compiled Statutes.** Sec. 260, § 720, p. 691; P. 997, Sec. 1260, § 679, p. 657; Div. 5, Sec. 1391, § 501, p. 496. **General Laws.** Div. 5, Sec. 260, § 400, p. 420; Div. 5, Sec. 1477, § 641, p. 615. **Laws.** 1865, Act, Jan. 12, § 113, p. 117; 1876, p. 64, Sec. 6, § 896, p. 850; 1877, Act, Mar. 3, § 480, p. 484.

NEBRASKA.

Civil Code Procedure. Sec. 149, § 543, p. 548; Sec. 847-851, § 543, p. 547; Sec. 849, § 545, p. 549; Sec. 1023, § 320, p. 335. **Compiled Statutes.** Ch. 23, Sec. 7, § 112, p. 116; Ch. 54, Art. 1, Sec. 2, § 506, p. 503; Ch. 63, Secs. 1, 5, § 375, p. 402; Ch. 73, Sec. 39, § 538, p. 541; Ch. 77, Sec. 44, § 803, p. 768; Ch. 77, Secs. 123-128, § 816, p. 781; Ch. 77, Sec. 181, 809, p. 772. **Compiled Statutes (1895).** Sec. 3667, § 506, p. 503; Sec. 4140, § 613, p. 602; Secs. 6077-6095, 6101, § 296, p. 311. **Laws.** 1889, Act, Mar. 27, § 403, p. 423; § 877, p. 838.

NEVADA.

General Statutes. Sec. 539, § 355, p. 378; Secs. 2596, 2597, § 614, p. 602.

NEW HAMPSHIRE.

Public Statutes. Ch. 137, Sec. 6, § 615, p. 603; Ch. 137, Sec. 12, § 419, p. 436; Ch. 141, Secs. 16, 17, § 499, p. 493.

NEW JERSEY.

Revision. P. 113, Sec. 56, § 712, p. 685; P. 156, Sec. 15, § 294, p. 309; P. 707, Secs. 25, 26, § 539, p. 543. **Supplement.** P. 267, § 108, p. 112; P. 490, pl. 6, § 526, p. 526. **General Statutes (1895).** Vol. 1, p. 811, Sec. 11, § 616, p. 603; Vol. 1, p. 866, Sec. 76, § 616, p. 603; Vol. 1, p. 871, Sec. 98, § 616, p. 603; Vol. 1, p. 892, Sec. 192, § 616, p. 603; p. 2017, Sec. 26, § 482, p. 484. **Laws.** 1868, Act, Mar. 30, § 798, p. 759; 1868, p. 551, § 798, p. 759; 1892, p. 358, § 504, p. 501; 1893, p. 161, § 748, p. 711; 1895, p. 821, § 482, p. 484; 1895, p. 368, § 163, p. 162.

NEW MEXICO.

Compiled Laws. 1884, Sec. 1520, § 494, p. 489; Sec. 1524, § 493, p. 488; § 507, p. 504; § 508, p. 505; § 509, pp. 506, 507; Secs. 2765, 2766, § 617, p. 603.

NEW YORK.

Revised Statutes. Vol. 1, p. 393, Sec. 17, § 801, p. 766; Vol. 1, p. 393, Sec. 20, § 801, p. 765; Vol. 1, p. 730; Sec. 65, § 850, p. 819; Vol. 1, p. 733, Sec. 84, § 252, p. 264; Vol. 1, p. 740, Sec. 1, § 372, p. 398; Vol. 1, p. 756, Ch. 3, § 290, p. 305; Vol. 2, p. 137, Sec. 5, § 45, p. 58. **Birdseye's Revised Statutes (1896).** Vol. 1, p. 932; Vol. 3, p. 2631, § 618, p. 603. **Code Civil Procedure.** Sec. 1671, § 455, p. 473; Sec. 2719, § 181, p. 174. **Laws.** 1860, Ch. 360, § 64, p. 76; 1880, Ch. 542, § 798, p. 759; 1881, Ch. 361, § 798, p. 759; 1885, Ch. 342, Sec. 5, § 500, p. 495; 1885, Ch. 342, Sec. 24, subd. 6, § 517, p. 517; 1886, Ch. 257, § 850, p. 819; 1887, Ch. 723, § 248, p. 258; 1892, Ch. 686, Sec. 16, § 821, p. 821; 1893, Ch. 711, Sec. 20, § 821, p. 786; 1895, Ch. 793, p. 560, § 164, p. 162; 1896, Ch. 272, Secs. 20, 21, 25, 26, § 483, p. 484; 1896, Vol. 1, p. 602, Ch. 547, Sec. 223, § 164, p. 162; 1896, Vol. 1, Ch. 547, Sec. 224, § 618, p. 603; 1896, Ch. 547, Sec. 241, § 721, p. 691; 1896, Vol. 1, Ch. 547, Sec. 249, § 164, p. 162; 1896, Vol. 1, Ch. 547, Sec. 250, § 164, p. 163; 1896, Vol. 1, Ch. 547, § 251, § 164, p. 163; 1896, Vol. 1, Ch. 547, Sec. 258, § 164, p. 163; 1896, Vol. 1, Ch. 547, Sec. 260, § 164, p. 163; 1896, Vol. 1, Ch. 547, Sec. 261, § 164, p. 164; 1896, Vol. 1, Ch. 547, Sec. 273, § 618, p. 603.

NORTH CAROLINA.

Constitution. Art. 10, Sec. 3, § 355, p. 378. **Code.** Ch. 46, Sec. 44, § 308, p. 320; Ch. 54, § 66, p. 78; Sec. 435, § 449, p. 470; Sec. 473, § 375, p. 401; Sec. 525, § 686, p. 663; Sec. 596 § 816, p. 780; Sec. 1245, § 722, p. 691; Secs. 1249, 1257, § 629, p. 604; Sec. 1754, § 425, p. 442, 443; Sec. 1781, § 494, p. 489; Sec. 1840, § 484, p. 485; Sec. 1883, § 716, p. 690; Sec. 2751, § 754, p. 716. **Revised Statutes (1893).** Sec. 2548, § 578, p. 584. **Laws.** 1887, Ch. 214, § 581, p. 586; 1887, Ch. 214, Sec. 3, § 255, p. 267; 1891, Ch. 326, Sec. 66, § 816, p. 780; 1893, Ch. 78, § 336, p. 356; 1893, Ch. 296, Sec. 20, § 798, p. 759; 1893, Ch. 453, § 331, p. 348; 1895, Act, Mar. 13, Sec. 1, § 331, p. 348.

NORTH DAKOTA.

Revised Codes. Secs. 3531, 4711, § 630, p. 604. **Compiled Laws.** Sec. 5423, § 556, p. 561. **Laws.** 1883, Ch. 99, § 798, p. 759; 1895, p. 1, § 165, p. 164.

OHIO.

Revised Statutes. Sec. 2852, § 256, p. 268; Secs. 4108-4110, 4131, 4132, § 621, p. 604; Sec. 4709, § 658, p. 630; Sec. 5056, § 456, p. 474; Sec. 5368, § 451, p. 470; Sec. 5699, § 110, p. 115; Sec. 6335, § 46, p. 59; Secs. 6343, 6344, § 331, p. 349. **Laws.** Vol. 23, p. 57, § 653, p. 625; Vol. 60, p. 44, § 653, p. 625.

OKLAHOMA.

Revised Statutes (1893). Ch. 34, Secs. 1, 2, § 349, p. 372; Par. 1616, § 622, p. 605. **Statutes.** P. 1145, § 644, p. 618.

OREGON.

Hill's Code. Sec. 292, § 404, p. 424; Sec. 3059, § 334, p. 352; Sec. 3673, § 507, p. 504. **Hill's Annotated Laws.** Secs. 316, 318, 329, § 35, p. 48; Sec. 855, subd. 5, § 643, p. 616; Sec. 2732, § 798, p. 760; § 800, p. 761; Secs. 3035, 3036, § 623, p. 605; Sec. 3600, § 653, p. 626. **Laws.** 1891, Act, Feb. 20, Sec. 1, § 496, p. 492.

PENNSYLVANIA.

Constitution. Ch. 18, Sec. 24, § 94, p. 100. **Brightly Purdon's Digest.** P. 152, Secs. 1-8, § 624, pp. 605, 606; P. 934, pl. 40, § 177, p. 172; P. 1386, § 803, p. 768. **Laws.** 1770, Act, Feb. 24, § 22, p. 36; 1827, Act, Apr. 14, § 803, p. 768; 1834, Act, Feb. 24, § 671, p. 650; 1834, Act, Apr. 15 (P. L. 539), § 94, p. 100; 1836, Act, Mar. 21, § 248, p. 258; 1836, p. 772, § 297, p. 312; 1836, Act, June 16, Sec. 83, § 425, p. 443; 1836, Act, June 16, § 494, p. 489; § 517, p. 517; 1838, Act, Apr. 16, § 799, p. 761; 1840, Act, Oct. 13, Sec. 6, § 256, p. 268; 1848, Act, Apr. 11, § 366, p. 394; 1852, Act, Apr. 27, § 585, p. 589; 1854, Act, Feb. 2, § 585, p. 589; 1855, Act, May 7, § 585, p. 589; 1856, Act, Apr. 2, § 732, p. 699; 1856, Act, Apr. 11, § 585, p. 589; 1856, Act, Apr. 21, § 517, p. 517; 1862, p. 364, § 296, p. 311; 1876, Act, Feb. 17, § 46, p. 59; 1878, Act, May 25, § 24, p. 37; 1879, Act, June 4, § 798, p. 760; 1879, Act, June 7, § 803, p. 768; 1883, Act, June 1, (P. L. 58), § 94, p. 100; 1885, Act, May 29 (P. L. p. 29), § 248, p. 258; 1887, Act, May 18, § 517, p. 517; 1887, Act, May 25, § 248, p. 258; 1889, Act, June 1, § 803, p. 768; 1891, p. 53, § 23, p. 37; 1893, p. 415, § 662, p. 634.

RHODE ISLAND.

Public Statutes. Ch. 64, Sec. 35, § 248, p. 258; Ch. 166, Sec. 4, § 486, p. 485; Ch. 173, Secs. 6, 7, § 23, p. 37; Ch. 194, Secs. 4, 13, § 486, p. 485. **Laws.** 1893, Ch. 8, Sec. 23, § 671, p. 650; 1893, Ch. 1204, § 486, p. 485; 1896, Ch. 335, § 486, p. 485.

SOUTH CAROLINA.

Constitution. Art. 9, Sec. 8, § 14, p. 30. **General Statutes.** Sec. 1511, § 762, p. 724; Sec. 2037, § 487, p. 486. **Revised Statutes (1872).** Ch. 82, Sec. 2, § 711, p. 684; P. 188, Ch. 23, Sec. 5, § 21, p. 36; P. 441; Sec. 10, § 114, p. 118. **Revised Statutes (1893).** Sec. 222, § 798, p. 760; Sec. 746, § 304, p. 318; Sec. 1688, § 762, p. 724; Sec. 1938, § 214, p. 208; Sec. 1952, § 376, p. 403; Sec. 1957, § 375, p. 401; Sec. 1968, § 714, p. 686; Sec. 2149, § 415, p. 433; Sec. 2247, § 541, p. 544; Sec. 2561, § 304, p. 318. **Code Civil Procedure.** Sec. 114, § 541, p. 544; Sec. 156, § 565, p. 570; Sec. 274, § 547, p. 551; Sec. 310, § 452, p. 471; Sec. 2130, § 356, p. 380. **Laws.** 1824, Sec. 4, p. 24, § 103, p. 107; 1887 (19 Stat. 862), § 809, p. 772; 1892, Sec. 24, § 798, p. 760.

SOUTH DAKOTA.

Compiled Laws. Sec. 1542, subd. 14, § 798, p. 760; Sec. 1629, § 810, p. 773; Sec. 2392, § 764, p. 726; Sec. 3254, § 181, p. 174; Secs. 3293, 3294, § 538, p. 540; § 710, p. 683; Sec. 3303, § 38, p. 53; Sec. 3545, § 773, p. 734; Sec. 4360, § 538, p. 540; Sec. 4365, § 540, p. 544; Secs. 4601, 4610, § 634, p. 609; Sec. 5159, § 555, p. 560; Sec. 5413, § 533, p. 532; Sec. 5449, § 660, p. 632; Sec. 5480, § 499, p. 495. **Compiled Laws (1893).** § 161, § 810, p. 773.

TENNESSEE.

Constitution. Art. 11, Sec. 11, § 353, p. 375. **Code (1884).** Secs. 2901, 2902, § 625, p. 607; Sec. 3796, § 839, p. 809; Sec. 4283, § 837, p. 805. **Milliken & Vertrees' Code.** Sec. 2873, § 21, p. 36; Sec. 2935, § 353, p. 375; Sec. 3338, § 366, p. 393; Sec. 3459, § 39, p. 54; Secs. 3679, 3697, § 625, p. 607; Secs. 4381, 4385-4391, § 176, pp. 171, 172; Sec. 4549, § 839, p. 809; Sec. 5026, §§ 837, 839, pp. 805, 809; Sec. 5040, § 839, p. 810.

TEXAS.

Constitution. Art. 8, Sec. 1, § 344, p. 364; Art. 8, Sec. 9, §§ 343, 345, pp. 363, 367; Art. 11, Sec. 5, § 343, p. 364; Art. 16, Sec. 37, § 517, p. 517; Art. 16, Sec. 50, §§ 342, 343, 345, pp. 361, 363, 367; Art. 16, Sec. 51, § 360, p. 384; Art. 16, Sec. 87, § 504, p. 501. **Sayles' Early Laws.** Vol. 2, Art. 1748, § 653, p. 626. **Revised Statutes.** Art. 376, § 343, p. 362; Art. 2515, § 409, p. 428; Arts. 3107-3109, § 426, p. 444; Art. 3165, § 504, p. 501. **Sayles' Civil Statutes.** Arts. 3976a, 3976b, 4023a, § 653, p. 626. **Laws.** 1837, Act. Dec. 14, § 653, p. 626; 1850, Act, Feb. 8, § 653, p. 626; 1863, Act, Dec. 15, § 653, p. 626; 1879, Act, Mar. 24, § 337, p. 357; 1879, Act, July 14, § 653, p. 626; 1881, Act, Apr. 9, § 653, p. 626; 1883, Act, Feb. 2, § 653, p. 626; 1891, p. 130, Ch. 87, Sec. 1, § 638, p. 612.

UTAH.

Compiled Laws. Sec. 2305, § 626, p. 607; Secs. 2614, 2615, § 626, p. 607; Secs. 3916, 3917, § 730, p. 697; Sec. 4196, § 310, p. 324.

VERMONT.

Revised Laws. Sec. 1076, § 352, p. 374; Sec. 1502, § 215, p. 208; Sec. 1894, § 349, p. 371. **Revised Statutes (1894).** Secs. 2221, 2232, § 627, p. 607.

VIRGINIA.

Code (1887). Sec. 2267, § 109, p. 114; Sec. 2295, § 490, p. 486; Sec. 2416, § 628, p. 607; Secs. 2432, 2562, §§ 571-573, pp. 575-579; Secs. 2475, 2476, § 506, p. 503; Sec. 2476, § 511, p. 509; Secs. 2476, 2478, § 508, p. 505; Secs. 2499, 2509, § 628, p. 607; Secs. 2548-2550, § 175, p. 170; Sec.

2562, § 580, p. 585; Sec. 2898, § 427, p. 447; Sec. 2999, § 490, p. 486; Sec. 3299, § 675, p. 654. **Laws.** 1877-78, p. 248, Sec. 2, § 113, p. 118; 1883-84, p. 494, § 574, p. 580; 1890, Ch. 55, § 166, p. 164; 1895-96, p. 486, § 490, p. 486; 1895-96, p. 542, § 166, p. 165.

WASHINGTON.

General Statutes. Secs. 1422, 1439, § 710, p. 683; Sec. 1467, § 171, p. 168; § 894, p. 848; Sec. 2170, § 688, p. 664. **Code (1881).** Sec. 1978, § 517, p. 517; Secs. 2936, 2937, § 817, p. 781. **Hill's Codes.** Sec. 1413, § 71, p. 82; Sec. 1481, § 71, p. 82; Secs. 2162, 2165, § 643, p. 616; Sec. 2172, § 643, p. 617; Vol. 1, Sec. 1667, § 507, p. 504; § 508, p. 505; Vol. 2, Secs. 504, 508, § 554, p. 559; Vol. 2, Sec. 519, § 301, p. 313; § 555, p. 560. Vol. 2, Sec. 549, subd. 3, § 417, p. 434; Vol. 2, Sec. 564, § 320, p. 335; Vol. 2, Sec. 628, § 549, p. 552. **Code Civil Procedure.** Sec. 115, § 781, p. 741; Sec. 449, § 444, p. 465; Sec. 529, § 211, p. 206; Secs. 1006, 1007, § 308, p. 322. **Code (1896).** Secs. 2135-2138, § 629, p. 608. **Laws.** 1871, p. 70, Sec. 12, § 71, p. 82; 1873, p. 466, Sec. 8, p. 481, § 23, p. 37; 1889-90, p. 435, Sec. 11, § 759, p. 720; 1891, Ch. 140, Sec. 48, p. 298, § 801, p. 764; 1895, p. 197, Ch. 105, § 71, p. 82.

WEST VIRGINIA.

Code. Ch. 31, Secs. 9, 13, § 807, p. 771; Ch. 43, Sec. 31, § 196, pp. 192, 193; Ch. 73, Secs. 1, 3, § 630, p. 608; Ch. 74, Sec. 2, § 331, p. 349; Ch. 75, Sec. 4, § 509, p. 507; § 511, p. 509; Ch. 100, Sec. 14, § 825, p. 790; Ch. 130, Sec. 21, § 630, p. 608; Ch. 130, Sec. 31, § 511, p. 509; Ch. 139, Sec. 5, § 442, p. 465. **Laws:** 1893, Ch. 3, § 491, p. 487; 1893, Ch. 24, Sec. 6, § 638, p. 612.

WISCONSIN.

Territorial Statutes (1839). P. 184, Sec. 38, § 182, p. 176. **Revised Statutes (1858).** Ch. 89, Sec. 18, § 896, p. 850. **Revised Statutes.** Sec. 1165, § 814, p. 778; Sec. 1166, § 711, p. 684; Secs. 1702q, 1702r, § 546, p. 550; Secs. 2077, 2078, § 441, p. 464; Sec. 2078, § 338, p. 357; Sec. 2157, § 631, p. 608; Secs. 2237, 2246, § 631, p. 608; Sec. 2278, § 883, p. 843; Sec. 2302, § 419, p. 437; Sec. 2364, § 373, p. 400; Sec. 2993, § 356, p. 379; Secs. 3096, 3098, § 29, p. 44; Sec. 3096, § 377, p. 403; Sec. 3103, § 546, p. 549; Secs. 3835, 3836, § 338, p. 357. **Laws.** 1864, Ch. 270, Sec. 1, § 355, p. 379; 1891, Ch. 401, § 217, p. 210; 1895, Ch. 86, § 492, p. 487; 1895, Ch. 125, p. 212, § 167, p. 165.

WYOMING.

Revised Statutes. Secs. 25, 26, § 632, p. 608. **Laws.** 1890-91, Ch. 70, Sec. 9, subd. 14, § 549, p. 552; 1895, p. 210, Ch. 93, § 168, p. 165; 1895, p. 211, § 168, p. 166; 1895, p. 213, § 168, p. 166.

